RIVISTA DI DIRITTO INTERNAZIONALE
VOLUME C - 2017 SUPPLEMENTO AL FASC. 1

PUBBLICAZIONE TRIMESTRALE

Poste Italiane s.p.a. - Spedizione in a.p. - D.L. 353/2003 (conv. in L. 27/02/2004 n° 46)
art. 1, comma 1, DCB (VARESE)

ISSN 0035-6158

QUADERNI DELLA RIVISTA DI DIRITTO INTERNAZIONALE
6

GAETANO ARANGIO-RUIZ

STATE RESPONSIBILITY REVISITED

THE FACTUAL NATURE OF THE ATTRIBUTION OF CONDUCT TO THE STATE

MVLTA PAVCIS AG
GIUFFRÈ EDITORE

Quaderni della Rivista di diritto internazionale
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Poste Italiane s.p.a. - Spedizione in a.p. - D.L. 353/2003 (conv. in L. 27/02/2004 n° 46) art. 1, comma 1, DCB (VARESE)
ISSN 0035-6158
Anno C

SUPPLEMENTO AL N. 1/2017
DELLA RIVISTA DI DIRITTO INTERNAZIONALE

(2017) Tipografia «MORI & C. S.r.l.» - 21100 Varese - Via F. Guicciardini 66

To Robert Kolb,
in sign of gratitude from a member of the Italian School
for his splendid translation of Gaetano Morelli's
"Nozioni di diritto internazionale"

The author wishes to acknowledge the valuable help received by Marina Spinedi, Alessandra Gianelli, Maria Luisa Alaimo and Mario Gervasi.

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"[I]l convient de souligner que l'approche normative ne constitue pas une évidence" (1)

I.
INTRODUCTION

CONTENTS: 1. The normative concept of attribution of conduct to the State. Article 2 (*a*) of the 2001 ILC Articles on State Responsibility. — 2. Reservations on the theory's soundness. — 3. A not small question of terminology. — 4. Object and plan of the work. — 5. Methodology.

1. Despite its widely positive *accueil* in the literature since about the Nineteenseventies, the normative theory of attribution calls for a number of reservations. As repeatedly formulated in Chapter II of the International Law Commission's (ILC) Articles on State Responsibility, adopted on final reading in 2001, "[t]he attribution of conduct to the State as a subject of international law is based on *criteria determined by international law* and not on the mere recognition of a link of factual causality" (2) (emphasis added).

The importance of the theory in question and its implications should not be underestimated. Formulated as it is at the outset of the

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(1) KRESS, *L'organe* de facto *en droit international public: réflexions sur l'imputation à l'Etat de l'acte d'un particulier à la lumière des développements récents*, *Revue générale de droit int. public*, 2001, p. 93 ff., footnote 122.

(2) Para. 4 of the Introductory Chapter to the cited Chapter II of the 2001 ILC Articles on State Responsibility, which continues as follows: "[a]s a normative operation, attribution must be clearly distinguished from the characterization of the conduct as internationally wrongful. Its concern is to establish that there is an act of the State for the purposes of responsibility. To show that conduct is attributable says nothing, as such, about the legality or otherwise of that conduct, and rules of attribution should not be formulated in terms which imply otherwise. But the different rules of attribution stated in Chapter II have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects. For example a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it. In this respect there is often a close link between the basis of attribution and the particular obligation said to have been breached, even though the two elements are analytically distinct." (*Yearbook of the Int. Law Commission*, 2001, vol. II, Part Two, p. 39).

Articles, the normative theory, together with the eight Articles of Chapter II that are based thereupon, is obviously intended not just as a product of the mind offered for reflection to scholars, judges and arbitrators. It is more than that.

According to the terms of Article 2 (*a*) and the commentary thereto, the normative theory is meant as a provision of general import applying to all the ILC Articles on State Responsibility as adopted by the UN General Assembly by Resolution 56/83 of 12 December 2001 and recommended thereby to the membership's attention. It is generally recognized by the literature and repeatedly referred to by the International Court of Justice and other judicial bodies — despite the non-binding character of the Articles — as part of customary international law. Although the ICJ's and other tribunals' pronouncements only make law for the parties in the relevant judicial or arbitral decisions adopting the theory, and although the Articles have not gone through the process leading to an international convention, the normative theory is more than just doctrine. In fact, following Article 2 (*a*) and the commentary thereto, as well as the introductory commentary to the Chapter embracing all the provisions relating to attribution, a State's action or omission generating responsibility *exists or not* just as *a matter of law*, namely, on the basis of the allegedly customary law of attribution as supposedly spelled out in 2001 by the ILC's Articles 4 to 11. It must be realized, in other words, that the normative theory is not a matter of imaginative language, but a practical indication to judges and arbitrators on the positive or negative condition of State responsibility, such condition depending on the attribution criteria set forth in the respective norms as determined by Chapter II of the ILC's Articles on State Responsibility (3). That the conduct's attribution to the State is to be made "under international law" is stated first in Article 2 (*a*) and reiterated in para. 1 of the Commentary thereto as well as in para. 1 of the introductory Commentary to Chapter II (4).

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(3) Cfr., in that sense, Spinedi's considerations in *La responsabilità dello Stato per comportamenti di* private contractors, in *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti* (Spinedi, Gianelli and Alaimo eds.), Milano, 2006, p. 67 ff., at p. 91 f., note 51.

(4) Para. 2 of the Commentary to Article 2 adds that the two elements indicated in that Article (namely, attribution of conduct and breach of an international obligation): "were specified, for example, by the [PCIJ] in the *Phosphates in Morocco* case. The Court explicitly link[ing] international responsibility with the existence of an 'act *being attributable* to the State and described as contrary to treaty right[s] of another State'". The same paragraph relates that the ICJ also referred to the two elements *inter alia* in the *Hostages* case where it stated "first, it must *determine how far, legally*, the acts in question *may be regarded as imputable* to the [...] State". Mention is also made (*ibid.*)

2. The normative theory utterly fails on two crucial counts: the reading of arbitral and judicial decisions and the concept's theoretical foundation.

In the first place, the theory is not in conformity with allegedly relevant decisions, where the acting judges or arbitrators do not appear to base their decisions dealing with attribution on any specific international legal rules. As I understood it, the attribution process — the intellectual operation of bridging the gap between human conduct and a given State — is part of the *quaestio facti*, not of the *quaestio iuris* of the process leading a tribunal to a finding of a given State's responsibility. It will be shown, indeed, that it is completely arbitrary to state, as daringly done recently by two commentators, that the normative concept of attribution "is in *complete harmony* with the international case law" ([5]). A serious analysis of the decisions proves the opposite. In particular, the reference to "attribution rules of customary law" has become fashionable only in the decisions following the ILC's rather hasty conclusive endeavours on the subject. Only rarely it appears in

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of the *Dickson Car Wheel Company* case where the Mexico-US General Claims Commission noted that "the condition required for a State to incur international responsibility" is "that an unlawful international *act to be imputed to it*, that is, that there *exists a violation* of a duty imposed by an international juridical standard" (emphasis added) (*Yearbook of the Int. Law Commission*, 2001, vol. II, Part Two, p. 34). That attribution should be made under international law was also stressed by Simma, in his Drafting Committee Chairman Report of 1998 (*Yearbook of the Int. Law Commission*, 1998, vol. I, p. 288, para. 74), announcing a similar stressing in the commentary.

It will be noted, however, that attribution is described as a "legal" operation only in the second of the above-quoted jurisprudential *dicta*. Even there it is *not* absolutely clear whether normativity relates to the merits of attribution or, more modestly, to the juridical nature of the *determination by judges or arbitrators*. Moreover, no language is present in *Phosphates* or in *Dickson* indicating that the judges *applied or professed a normative concept of attribution*. In both cases one speaks only of attribution.

In my view the only piece of evidence upon which the so-called normative theory might find some support, is represented by a few draft provisions that have appeared in earlier State responsibility public or private codification attempts or drafts: a much too scant foundation for such an outstanding feat as the full-fledged integration of the normative theory into the ILC State responsibility system. The drafts I refer to are, of course, those cited and quoted in Ago's Third Report (AGO, *Third Report on State Responsibility*, in *Yearbook of the Int. Law Commission*, 1971, vol. II, Part One, especially pp. 238-239, para. 126). One could add, perhaps, a few more. Be it as it may with such drafts, no mention of attribution (far less of legal rules attributive of human conduct to a State) appears either in the 1927 Resolution of the International Law Institute on State responsibility for injuries to aliens or in the Strisower Report and the debates on the basis of which that resolution was adopted.

([5]) CONDORELLI, KRESS, *The Rules of Attribution: General Considerations*, in *The Law of International Responsibility* (Crawford, Pellet and Olleson eds.), Oxford, 2010, p. 225, note 16.

the previous practice. And the same must be said of the literature preceding the Nineteenseventies.

Secondly, the normative theory's inspiration manifestly resides, if one looks at the matter with some depth (particularly in light of its main originator's teaching), in a concept of international law and its relationship with municipal law [*rectius*, in my view, interindividual law, national and international: something quite different from *les deux couches* theory proposed by Sassoli (6)] that is radically different from that of Anzilotti, Ago himself and a large part of the Italian and German contemporary schools of international law, not to mention the two Hague Courts. The two cited commentators rightly establish, in fact, a close interrelationship of the normative concept of attribution (not to mention the State's international person's concept) with Hans Kelsen's well-known concept of international law's relationship with municipal law, particularly with that author's essentially incorporeal concept of the State as an international person. At their p. 226, note 18, the said authors quote, indeed, Kelsen's *The Pure Theory of Law* (7). They should have better referred, in the present writer's view, also to other Kelsen's pages, particularly those pages of the same book where that master rejects any corporeal, "space-filling" notion of the State as an international person: that is, within Kelsen's logic, the very theoretical ground upon which the normative concept of attribution wrongly would rest.

Indeed, the normative concept of attribution as well as other aspects of the ILC's approach to its task had been the object of severe criticism by a considerable part — especially Anglo-American — of academia. For the sake of brevity, I confine myself to reporting *verbatim* the list of important objectors offered by Condorelli in the opening pages of his Hague lectures on "imputation", namely: Parry ("brouillard de raisonnements circulaires"), Schwebel ("essence tautologique"), Lillich ("tautological propositions and circular definitions"), McDougal ("totalement abstraits") and Lauterpacht ("centrés sur ce qui est 'inessential' tandis que ce qui est 'essential' est laissé de côté"), summing with the quotation of Goldie, according to whom the fundamental tort of the ILC would have been "de s'être laissé convaincre de rejeter la méthode pragmatique qui distingue l' 'Anglo-

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(6) SASSOLI, *L'arrêt Yerodia. Quelques remarques sur une affaire au point de collision entre les deux couches du droit international*, *Revue générale de droit int. public*, 2002, p. 791 ff.

(7) KELSEN, *The Pure Theory of Law*, Berkeley, 1970, p. 320 ff.

American approach' pour embrasser la 'more philosophical and generalized view' qui serait typique de la 'Continental School'" (8).

On close analysis, the normative theory of attribution appears to be a groundless theorizing excess of contemporary international legal scholarship. Among its nefarious consequences, are such manifest errors as the part of the ICJ *Nicaragua* judgment concerning the *contras* misdeeds and the main import of the ICJ *Genocide* judgment: two spots on the coat of arms of a worthy international institution that lost its authority by sluggishly relying upon an inadequately elaborated and hastily adopted, allegedly codified, "customary international law" of attribution, without even attempting a minimum effort of its own to ascertain the existence and contents of such a "law". In *Nicaragua*, the ICJ was led astray by an ill-placed reliance upon the questionable authority (and wisdom?) of the ILC. In *Genocide*, it added to the supposed authority of the latter body its own authority, as asserted in *Nicaragua.*

As well as by Kress, some doubts about the foundation of the normative theory are expressed — in a sense — by Wolf, according to whom: "[o]b es sich bei einer Zurechnung um einen rein intellektuellen Vorgang so Amerasinghe [*Imputability in the Law of State Responsibility for Injuries to Aliens*, *Revue égyptienne de droit international*, 22, 1966, p. 91 ff.] oder um einen normativen Vorgang (so Ago) handelt,

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(8) CONDORELLI, *L'imputation à l'Etat d'un fait internationalement illicite: solutions classiques et nouvelles tendances*, *Recueil des cours*, vol. 189, 1984-VI, p. 22. According to BROWNLIE's *System of the Law of Nations: State Responsibility*, vol. I, Oxford, 1983, p. 164 (quoted by Condorelli at p. 22, footnote 9), "[t]his distinction between 'act of State' and other conduct non attributable would appear to be an entirely theoretical question of 'essence' without any practical significance [...].The issue of classifying 'acts of State' is esoteric, irrelevant, and confusing". Ian Brownlie, in particular, doubted the very notion of an attribution "secondary" law process distinct from the law of attribution of responsibility. He did not go further, though, either in his scholarly writings, or in his capacity of Serbia's main advocate before the ICJ in the *Genocide* case. Far less did he pursue anywhere the remark, contained in his *Principles of Public International Law*[6], Oxford, 2003, p. 67, that: "in view of the complex nature of international relations and the absence of *a centralized law of corporations*, it would be strange if the legal situation had an extreme simplicity" (emphasis added); statement too vague, in my opinion, to describe the difficulty of defining the State's international person's nature. As I see it, though, an international "law of corporations" is lacking, at least (and especially) for the States' international persons, not just in general (customary) international law (supposedly not centralized), but even in the (supposedly less decentralized) law of treaties. I find Brownlie's discourse here rather puzzling: the strange thing is Brownlie's unexplained reluctance to explore in adequate depth the issue whether or to what extent the State's international person is to be conceived as a corporation proper under international law.

ist umstritten" (9). However, our factualist approach to attribution finds no help in Dr. Wolf's cited passage.

I draw encouragement, instead, from the study of Spinedi's article on private contractors (10). Considering the frequency and the variety of formulas by which States spare their organs resorting to the private contractors device, Professor Spinedi uses her whole interpretive talent in order to find in the ILC Draft — from Ago's provisionally adopted articles to the first (1996) and final (2001) reading — to see whether and how those provisions offer a safeguard against States' abuses of the practice in order to escape the attribution of private contractors' wrongful conduct. As explained in Spinedi's article's, the problem has not been met by the ILC with all the attention considered to be necessary by the author. And she notes with regret the provision contained in Chapter II of the final, 2001, version of the Draft, according to which attribution of conduct to States for the purposes of their responsibility is based upon criteria determined by international law and not upon recognition of a relationship of natural causality. The author adds at this point a footnote which, after quoting the said provisions, reads as follows:

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(9) *Die gegenwärtige Entwicklung der Lehre über die völkerrechtliche Verantwortlichkeit der Staaten*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1983, p. 481 ff., at pp. 488-489, footnote 23. It must be noted, however, that Amerasinghe's definition is the practically exact quotation — with mostly irrelevant alterations — from STARKE's *Imputability in International Delinquencies*, *British Yearbook of Int. Law*, 1938, p. 104 ff., at p. 105, where the latter stated: "[t]he imputation is thus the result of the intellectual operation necessary to bridge the gap between the delinquency of the organ or official and the attribution of breach and liability to the State". The only remarkable differences from my point of view between Amerasinghe's and Starke's definitions are the use of "act" instead of "delinquency" and the phrase "of the breach of an obligation and responsibility to the State" instead of "of breach and liability to the State". Leaving out these differences, considered further on, I deem not futile to note that while offering surely some verbal comfort to a "factualist" by the words "intellectual operation" — precisely what attribution is — Starke and Amerasinghe do not express, *hélas*, in their articles (nor does Starke in his manual), an unambiguously factual view of the attribution process. Starke's position (in the manual) is actually quoted by Ago in support of his normative approach. Starke's article, in particular, is for me very confusing because that scholar's frequent references to the relationship between international and national law are accompanied, with respect, by an unexplained disregard — except for a fugacious reference to Kelsen's concept of the State "as an abstract juristic entity coextensive with the law governing a specified collectivity of individuals" [Starke's cited article at p. 105] — for the problem of the relationship between national and international law and a remarkably total ignorance of any of the most relevant non-Kelsenian views of the matter by scholars of the calibre of Oppenheim, Triepel and Anzilotti, not to mention the well-known fundamental statements by the Permanent Court recalled *infra*. This weakens somehow Ago's reliance on Starke's position.

(10) SPINEDI, *La responsabilità dello Stato*, cit., p. 67 ff.

> " ... [n]on intendo in questo scritto prendere posizione sulla esistenza o meno di norme giuridiche (di diritto internazionale) che stabiliscano quando un comportamento tenuto da un individuo debba essere considerato un fatto dello Stato. Ciò richiederebbe ben altri approfondimenti di quelli che possono essere svolti in questo articolo [...] Non essendo possibile in questo scritto approfondire la questione della esistenza di norme di diritto consuetudinario in materia di attribuzione di fatti illeciti allo Stato, non affronterò la questione se sarebbe stato preferibile non trattare affatto nel progetto della materia o, tutt'al più, limitarsi a dire che vi è fatto dello Stato-soggetto di diritto internazionale ove si dimostri l'esistenza di un legame fattuale fra l'individuo che ha materialmente tenuto il comportamento e lo Stato" (11).

I am unable to tell whether Professor Spinedi was concerned with the length of the discourse necessary to demonstrate that attribution of human conduct for the purposes of State responsibility in international law is not covered by any rules of that law, but is merely a problem of factual connection between the person's or entity's conduct and the State (the so-called normative theory having no foundation in international law), or whether Professor Spinedi was too impressed by the questionable authority of the ILC. However, the perplexities raised by a theory too lightly and hastily espoused by the Commission under Ago's widespread and rightly respected authority are of such a number and variety as to have dissuaded Professor Spinedi from a thorough review of the theory's formulation.

To begin with, the existence of a customary law on attribution (or, for that matter, of given unwritten international rules on the topic) is far from having been proved in the copious, relevant decisions and literature. Single rules are asserted and applied but hardly demonstrated as juridical, normative propositions. Arbitral and judicial reasonings, although exceptionally accompanied by a general mention of international law (or law *tout court*) in terms that at times seem to refer to the breach of primary rules rather than to any specific (secondary) attribution rules, sound mostly like no more than the enumeration of the factual data upon which the judges or the arbitrators base the solution they deem to be appropriate for a *questio facti*. The only rules they apply are the tribunal's rules governing, precisely, the burden of proof, equality of arms and other procedural aspects of the operation. Although customary rules are referred to, in particular, by the ICJ (and with more assurance than justified), they are nothing more than the current ILC formulations allegedly codifying the international law of

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(11) Cited article, pp. 91-92.

attribution; they are not rules resulting — as in truth they should — from an autonomous research of customary rules conducted by the Court itself on the basis of a proper analysis of both practice and *opinio*.

Secondly, the existence of attribution rules — not to mention the existence of an international customary law of attribution — appears manifestly to be presented, as will be shown in the present writing (*infra*, Section IV), as the only possible answer to the necessity of determining the conduct of the States' international persons, when such persons are being envisaged as juristic persons, if not as the most perfect, juridically sophisticated juristic persons. States' conduct would only be determinable on the basis of international (or national) norms, just as the conduct of any private or public *personne morale* of municipal law is determined by legal rules.

Thirdly, the above-mentioned assumptions are based, in their turn, on equally deductive premises such as:

(i) the concept of international and national law as parts of one and the same legal system;

(ii) the idea that the States' allegedly juristic persons are as juridically pervaded and conditioned as any *personnes morales* of national law, international law manifesting not, with regard to the States' bodies' juridicization, that tendency to prone to effectiveness that it manifests in any other area covered by its rules;

(iii) the existence of customary rules on attribution, existence that has not been adequately demonstrated either by the ILC (including particularly Ago and Crawford), or by the ICJ, the latter body having confined itself to a passive acceptance of ILC findings and proposals.

3. A few points of terminology seem to be appropriate before proceeding any further. One speaks, of course, of attribution, not of "imputation". Notwithstanding the widely shared view that the term "imputation" is qualitatively indifferent from "attribution", the present writer believes that the latter term is, if not perhaps the most appropriate in absolute, surely more appropriate than "imputation". Of course, "imputation" was almost universally used in the less recent State practice, arbitral and judicial decisions and relevant literature. Numerous examples therefrom can be found in Roberto Ago's masterly Third Report to the ILC of 1971 (12). I think, however, that to the

(12) AGO, *Third Report on State Responsibility*, in *Yearbook of the Int. Law Commission*, 1971, vol. II, Part One, p. 199 ff.

extent that the attachment of human conduct to a State is distinguishable, as a judicial operation, from the identification of a State's action or omission triggering international responsibility, "imputation" is not the appropriate term to designate that attachment.

"Imputation" is of course current in the area of criminal law and jurisdiction (where it mostly indicates the attribution of legal consequences rather than the triggering facts or acts); and it is also largely used, at least in the civil law systems, in the theory of juristic persons (*personnes morales*), where one reads, for example, about imputation to the corporation of the acts of its agents; and (perhaps less frequently) in the law of torts, where one reads about imputation to the guardian of a minor's wrongful conduct (13). Leaving aside the merits or demerits of its use or abuse in the said fields, the term imputation has been used too long within the ILC, in the wake of Roberto Ago's Third Report — as well as of the literature analysed therein — for it not to be implicitly associated with the concept of the attribution process that was professed, in harmony with a perhaps not thoroughly analysed doctrine, by that eminent author. I refer to the concept of the attribution process as a juridical operation governed by international legal rules, that was so persuasively introduced in the work of the ILC as to be sanctioned both in the 1996 and in the 2001 version of the Commission's Articles. The term imputation has presumably been, and still is, among the factors of the widespread confusion between the attribution of the fact or act and the targeting of the legal consequences of the act or fact, and — more particularly — between the factual nature of the former operation and the juridical nature of the latter.

Although it is entitled "Attribution of Conduct to a State", felicitously avoiding the misleading term "imputation", Chapter II of the 2001 Articles remains evidently inspired by the questionable notion that (by justified or unjustified analogies with the above-mentioned theories of juristic persons and/or the civil law of torts) attribution would be an "opération effectuée par une règle de droit, donc un lien

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(13) In both the latter areas, however, I find that the term imputation is not exempt from ambiguity. It may indicate attachment either of the act (of the agent's act to the corporation or of the minor's act to the guardian) or, as I would be inclined to prefer, the attachment (to the corporation, respectively to the guardian) of the act's legal consequences. I refrain though, for the moment, from touching upon the issue whether and in what sense the term imputation is acceptable, either in the theory and practice of the law of corporations or in the area of the law of torts.

juridique". That such is the case is explicitly asserted in para. 4 of the commentary to that Chapter as a whole (14).

The merits or demerits of the normative concept of attribution will be addressed *ex professo* further on, together with the theories or theorems from which it stems. For the present preliminary purposes, suffice it to take note of the assertion, by a commentator of the ILC's Articles on attribution, that the normative concept of that process is not "une évidence". As noted by that commentator, there is also, in opposition to the normative concept, a factual approach to the operation (15). Such indeed being the case, the choice between imputation and attribution should not be left to chance or to merely literary or aesthetical criteria. The aforementioned juridical connotation of the term "imputation" — as used in the practice and the literature analysed in Ago's Third Report and firmly ensconced in the whole ILC's work on State responsibility — suggests that that term could not be adopted at a preliminary stage without conceding beforehand more than necessary to the normative concept. If and to the extent that attribution is to be considered as a distinct operation in view of the triggering of international responsibility, it seems wiser to discuss the matter under the neutral concept of attribution. It is actually fortunate that the ILC reverted early enough to "attribution" (16), a term that has surely the merit, in comparison to imputation, not to prejudge — *pace* the second and fifth ILC Special Rapporteurs and the vast majority of commentators — the choice between the normative and the factual nature of the process. According to commentators, Ago himself, apparently in

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(14) Cited Commentary to Chapter II, para. 4. The rest of the commentary seems essentially to confirm the substance of the above-quoted general statement.

(15) As rightly and fairly stated by KRESS, *L'organe* de facto, cit., p. 93 ff., footnote 122, "[i]l convient de souligner que l'approche normative ne constitue pas une évidence". There is, he notes, also an "[approche] factuelle". It is odd, however, that the same author states, within the very same article, that "[a]ucun des rapporteurs spéciaux qui ont suivi Ago (Riphagen, Arangio-Ruiz et, dès 1997, Crawford) n'a mis en doute le noyau dur du modèle d'imputation adopté par la CDI en première lecture" (p. 100). The present writer had done more than that in his Second Report as well as in an article *à la mémoire de Michel Virally* (ARANGIO-RUIZ, *State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance*, in *Le droit international au service de la paix, de la justice et du développement*, Paris, 1991, p. 25 ff.).

(16) It is worth recalling, though, that despite his acceptance of "attribution" (at some stage) as Special Rapporteur, Ago reverted to imputation in his capacity of ICJ judge. He did so, rather insistently in paras. 14, 15, 17, 18 and 19 as well as in footnote 1 at p. 189 of the interesting separate opinion that he attached to the *Nicaragua* judgment in order to dissociate himself from that part of para. 115 of the Court's majority text, where the latter "[introduced] the idea of control" (*I.C.J. Reports*, 1986, at p. 181 ff.).

view of the criminal law implications of the term imputation — implications abhorred by the Commission's "customers" and their more obsequious "servants" (borrowing the expressions of Professor Simma's) — took some distance, as Special Rapporteur, from the term "imputation" showing a disposition to accept attribution (17). As noted by a commentator, on the other hand, Ago had also expressed — curiously, in my opinion — the very different view (in 1973) "que l'on adopte le terme attribution ou le terme imputation, ou encore le terme rattachement, c'est toujours la même chose qu'on veut exprimer". (18) Be that as it may, I find utterly incomprehensible Professor Simma's remark — in his 1998 Drafting Committee Chairman Report — that "the Drafting Committee [had retained] the term 'attributable', which implied a legal operation, rather than replace it with the term 'imputable', which appeared to refer to a mere causal link" (19).

Going back to imputation, it seems also indispensable to stress that in addition to prejudging in a normative sense — by its above-noted ambiguity — the nature of the process, imputation wrongly distorts the phenomenon by implying (surely more than attribution would) the oxymoronic notion, widely shared by commentators, that international law ascribes to the State its organs' or agents' *international* wrongful act. It should be obvious, though, that international law only ascribes to the State (as the only international person involved) an internationally unqualified agents' or organs' *conduct*, such conduct *ex hypothesi* to

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(17) That term, however, was used perhaps by Ago in a less technical connotation as indicative of the result of the operation — namely of a given conduct's ascription to a State — rather than of the alleged legal operation. With regard to the operation itself, though, Ago firmly maintained the position that attribution was an "opération juridique" effected by legal rules. As Special Rapporteur the quoted author thus consistently applied, in the Articles relating to attribution, the prevailing view that an unlawful act — and not just its legal consequences — could be imputed by the applicable law to a natural as well as a juristic person.

(18) KRESS, *L'organe* de facto, cit., footnote 2, quoting from *Annuaire de la Commission du droit int.*, 1973, vol. I, pp. 53-54, para. 8. I leave aside, for the moment, a discussion of the view that both terms could be usefully substituted by any English equivalent of the French "rattachement" or the Italian "collegamento". "Appurtenance" would be ugly but perhaps technically more correct, that term precisely indicating that the act or fact factually (or better, so to speak, "naturally") emanates or promanates from the State (for any purposes of international relations and law) as a mere matter of fact, the law intervening only to evaluate the act of fact and imputing (or attributing) the legal consequences of the act or fact to the same State or to another State or entity. In other words, international law (as well, for that matter, as any other law) imputes liability, responsibility or other legal consequences of act or facts (lawful or unlawful). It does not impute acts or facts, the acts or facts being what they are and attributable to the entity or source from which they factually emanate.

(19) *Yearbook of the Int. Law Commission*, 1998, vol. I, p. 287 ff., at p. 288, para. 74.

qualify as a State's, not as an organ's or an agent's *international* wrongful act: failing ascription to a State, no internationally wrongful act (and consequent responsibility) would even be conceivable. It will be shown that that error is a very common one.

As Mohammed Shahabuddeen learnedly teaches, international law borrows pretty much — although not "lock stock and barrel" and "always provided that [it] remains master in its house" [20] — whenever it is useful to fill any or its conceptual or terminological gaps. Instances of such borrowing are surely concepts like "agent" and "organ", both used not uniformly in national legal systems. Although they are not infrequently used as synonyms, a marked difference is discernible within continental Europe.

"Agent" seems to me to be the term to indicate — in municipal law — a person operating at one of the ends of a legal relationship between two law-subjects, the opposite end being occupied by a "principal". Although not infrequently used indifferently, especially with regard to the individuals representing, as "agents", corporate bodies, the term organ is used frequently, especially in Italian and German law and literature, to indicate the persons composing the organization of a public or private juristic person (*personne morale*), including the State and its territorial or non-territorial subdivisions. The metaphor implied in the use of the term organ in the latter context is made rather questionable by the fact that what one calls the "organic" relationship — between agent and juristic person — is, more precisely, a juridical one. In other words, the persons operating in the name or on account of public or private corporate entities should be more appropriately envisaged as agents rather than organs.

Be it as it may of the municipal law of corporate bodies (*personnes morales*), it seems that a good case could be made for international law to accept some degree of analogy with the average municipal law with regard to both the term "agent" and the term "organ" while remaining, however, "master in its house".

At the level of the State and inter-State relations both terms — "agent" and "organ" — seem to be usefully practicable not without some adaptation. The term "agent" (as well "representative") would perfectly — in very reasonable analogy with the possible parallel in

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[20] SHAHABUDDEEN, *Municipal Law Reasoning in International Law*, in *Fifty Years of the International Court of Justice, Essays in Honour of Sir Robert J. Jennings* (Lowe and Fitzmaurice eds.), Cambridge, 1996, pp. 90-103. The first quoted sentence reported by Shahabuddeen at p. 99 is from McNair; the second one is in the cited article at p. 92.

municipal law — describe a State acting as agent or representative of another State in the relations with a third State, with which the represented State has no diplomatic relations. The presence of two international persons fully justifies the analogy with representation between natural persons as well as representation of a corporate entity by a natural person.

The same term seems not to be equally appropriate to indicate individual human beings acting for a State's international person. Two reasons make the analogy questionable. Firstly, the individuals involved being not international persons (or not acting as such when they serve as members of the State's structure), their position would not present a sufficient analogy with that of agents. Secondly, the factual (or tendentially factual) nature of the State's organization from the viewpoint of international law makes the relationship in question hardly comparable either to that of a natural person representing another natural person or to that of a person acting as a member of the juridical structure of a *personne morale* (or a full-fledged *personne morale*). These two features suggest that the term "organ" is more appropriate. The analogy with a natural person's physical organs is manifest.

4. As already stated, the present work's object is a discussion of the normative theory of attribution, as developed within the International Law Commission since about the Nineteenseventies and ultimately consolidated in Chapter II of the ILC 2001 Articles. This work concerns not, in principle, the merits of the attribution tests embodied therein, some of which are to an extent in factual conformity with reliable arbitral and judicial decisions and literature, namely with the attribution tests factually applied by judges and arbitrators in the relevant cases. The concern of the present study is the issue of the factual or juridical nature of the tests in question. To put it bluntly, the question dealt with here is not so much whether any of the tests contemplated in the above-mentioned Chapter are to any extent factually correct from the viewpoint of an international judge or arbitrator called upon to decide attribution in a case, although some of them may be more or less questionable. Without leaving out any pertinent issues of that kind — some of which have also a bearing on the credibility of the normative theory — the concern here is whether the ILC's attribution "norms" — absent a convention embodying the Articles — reflect, as most commentators believe, the customary rules of international law and, for that matter, whether there really is a "[customary] law of attribution" codified in the cited Articles 4-11 as assumed (under

Special Rapporteurs Ago and Crawford's guidance) by the ILC, and, on their wake, by some of the available post-1971 jurisprudential pronouncements.

The author's belief is that there are surely practices, experiences, usages and thus records of, or on, attribution, more or less perfectly or imperfectly reflected in Chapter II of the ILC Articles. However, the existence of a customary law of attribution is undemonstrated.

In the view of the present writer, the normative theory of attribution holds water neither in the arbitral and judicial practice, nor in the relevant works of the International Law Commission, nor in the literature nor, ultimately, within the framework of a proper understanding of the nature of international primary persons as well as the nature of international law and its relationship with interindividual law. The present work is intended so to demonstrate, by as thorough an exploration of the matter as the author hopes to be able to carry out, despite the discouraging confusion into which the topic seems to have plunged especially by the interplay between the ILC's hasty treatment of the matter and the copious literature. As will be shown, one of the most unfortunate consequences of the normative theory is the belief that any tribunal's decision on attribution based upon a given rule or principle may constitute, at least for that tribunal, a binding precedent — as any matter of law does (by a broad understanding of *iura novit curia*) — for any future decision of similar issues.

5. A point of method, however, must still be clarified, one that derives from an original flaw of the normative theory. Indeed, the claim of the authors of the "norms" (notably Special Rapporteurs Ago and Crawford) that the normative concept of attribution rested upon the use of an inductive method, is not as convincing as some commentators seem to believe. Surely, Roberto Ago's rightly celebrated Third Report is richly documented on the practice of attribution pursued by States and international bodies for no less than one hundred and fifty years. It was mostly on the basis of an inductively assembled collection of the kind of facts, upon the strength of which attribution had been predicated by international law operators in the course of that period, that Ago formulated, and the ILC accepted, the draft articles that were to become, through a number of concordant or discordant (though mostly concordant) inductively collected data, the 1996 and 2001 attribution "norms".

This inductive process, however, only concerned the factual grounds for attribution, namely, the factual data on the basis of which

attribution was, during that period, more or less uniformly and constantly predicated. The claim of inductive methodology would appear thus justified for the identification of the criteria embodied in a fair number of the ILC's attribution "norms". It was absolutely not so, on the contrary, with regard to the nature — factual or juridical — of the process through which the innumerable collected facts were brought to bear on their work by operators (and commentators) for the purposes of actual or hypothetical attribution. I refer to the crucial and copious conceptual elements collected, and more or less critically discussed by Ago, in the part of his Third Report that is devoted to the attitude of the law to the State's international person and its organization for international legal purposes (21).

In that part of the Report, the only data conceivable as the result of an inductive inquiry are those registering the scholarly views (as expressed in the literature) on the State's international person's nature and that person's structure from the viewpoint of the law (municipal or international). The choice, the assessment and the evaluation of those views — leading, respectively, to the espousal or rejection of theories on the role of law in the attribution process — are mere deductions from Ago's own or accepted views on fundamental theoretical assumptions, astonishingly accepted by the vast majority of the ILC membership with no hesitation and maintained throughout the entire work on the project without any second thought (22).

It follows that whoever proposes to test the normative approach to attribution against judicial realities faces a problem of method. The normative approach's theoretical premises are so questionable and the post-1971 decisions so inextricably entangled with those premises that one is tempted to adopt Erasmus Darwin's *boutade* on *a priori* reasoning, replace the premises of the normative approach with more valid

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(21) AGO, *Third Report*, cit., pp. 217 ff., 233 ff.

(22) One assumption was that States' international persons are juristic persons, notably the external faces of the State's juristic person of national law; the other assumption was the notion that that person (allegedly *personne morale*) is only able to act through individuals or groups determined by international law.

It was due to the compound impact of these assumptions that Roberto Ago's Third Report of 1971 presents the notion that the attribution of conduct to a State for the purposes of international law — the State being a juristic person — can only be made by international legal rules. And it is due to the compound effect of the same two fallacies (one of them somewhat implied) that para. 4 of the commentary to Chapter 2 of the 2001 Articles states that "[t]he attribution of conduct to the State as a subject of international law is based on criteria determined by international and not on the mere recognition of a link of factual causality" (*Yearbook of the Int. Law Commission*, 2001, vol. II, Part Two, pp. 38-39).

ones and deal with arbitral and judicial decisions at the end just to corroborate the appropriate theoretical premises ([23]). It was felt, though, that a critique of the normative theory would be unpersuasive if it consisted of a merely deductive application of theoretical, more correct, premises. I was thus better advised to follow instead Erasmus Darwin's more famous brother's view that proper theorizing must not precede but follow analysis ([24]). The table of contents of the present work shows in fact that arbitral and judicial decisions come first. However, the noted entanglement between (deductive) theory and arbitral/judicial practice will compel us to interpolate frequent theoretical *excursus* among the *volets* of judicial analysis. It is clear, in fact, that the normative theory is not only repeatedly considered, at the threshold of Chapter II of the Articles, as an indisputable, sacrosanct premise, and maintained as such throughout the ILC's endeavours on the subject, but that it has also acquired an undeservedly broad authority in the copious literature as well as the post-1971 decisions. The literature, in particular, while adhering to the ILC's normative theory and asserting "qu'on ne saurait avoir la clef de voute de la problématique de l'imputation tant qu'on n'est pas venu à bout de la question de savoir comment s'agencent les rapports du droit interne et du droit international à ce propos" ([25]), sets aside, without any serious explanation, crucial (and not just theoretical) tenets of international practice and legal scholarship concerning the relationship of international law to national law, which constitute an essential portion of the scientific *bagage* of the rightly renowned scholar in whose Reports to the ILC, notably the Third one, resides, if not the origin, the consolidation of the normative concept of attribution.

Once removed the artificial, false veil represented by the normative theory's attribution rules (of international or domestic law), one is better able to look at any case of contested attribution with the unprejudiced mind of the judge or arbitrator called to perform Starke's

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([23]) Erasmus A. Darwin's letter of November 23, 1859, second page in *The Life and Letters of Charles Darwin* (Francis Darwin ed.), vol. II, London, 1887, p. 233 f. at p. 234: "To me the geographical distribution [of the species], I mean the relation of islands to continents is the most convincing of the proofs, and the relation of the oldest forms to the existing species. I daresay I don't feel enough the absence of varieties, but then I don't in the least know if everything now living were fossilized whether the palaeontologists could distinguish them. In fact the *à* (*sic*) *priori* reasoning is so entirely satisfactory to me that if the facts won't fit in, why so much worse for the facts is my feeling".

([24]) Darwin's letter n. 118 (to H.W. Bates), first page, in *More Letters of Charles Darwin* etc. (Francis Darwin ed.), vol. I, London, 1903, pp. 176-177.

([25]) Condorelli, *L'imputation*, cit., pp. 27-28.

intellectual operation of "bridging the gap" between the contested human conduct and the allegedly responsible State's international person. I refer to the obvious *quaestio facti* to be resolved on the basis of the parties' allegations and evidence. In so doing, the judge will be subject, of course, to the general or special procedural rules governing the tribunal's operation (impartiality, burden of proof, equality of the parties etc.) but not by any rule or norm prescribing the application of given attribution criteria such as those codified by the ILC and widely recognized as the "customary law of attribution". The judge's only materials are the parties' *alligata et probata*.

Among such facts, however, there are likely to be, sooner or later in the proceedings, references by one party or both, or by the judge himself, to rules, provisions or principles either of domestic law or international law allegedly or supposedly relating to the respondent State's organization, and possibly allegedly supporting or excluding the attribution of the relevant internationally questionable conduct to the respondent State. It seems useful, therefore, in order to make the rejection of the normative theory clear, to see which *kind of role* could possibly be performed by rules, provisions or principles of international or domestic law with regard to the parties' contentions and the judge's reasoning about the attribution issue.

II.

THE ILC ARTICLES ON ATTRIBUTION IN LIGHT OF ARBITRAL AND JUDICIAL DECISIONS

CONTENTS: 6. Distinguishing pre- and post-1971 arbitral and judicial decisions for the purposes of a comparative analysis of the ILC 1971-2001 attribution articles. — 7. The pre-1971 decisions: essential inconsistencies with the normative theory. — 8. *Hostages*. A critical reading of the ICJ's distinction in two phases. Evaluation in light of the ILC Articles. — 9. Capital defects of the ICJ *Nicaragua* decision. — 10. Critical notations in the *Tadić* decision of the International Criminal Tribunal for the Former Yugoslavia. — 11. Decisions of ECHR, IUSCT, ICTY and other tribunals. — 12. Back to the ICJ: *Congo v. Uganda*. — 13. *Genocide*.

6. A comparative study of the ILC's work on attribution, on the one hand, and judicial/arbitral decisions and literature, on the other hand, shows similarities and discrepancies.

On terminology, a fair degree of concordance has now manifested itself for some time, between the ILC and judicial decisions, with regard to the alternative between "attribution" and "imputation", "attribution" prevailing also in the literature since about the end of the last century (1).

The ILC's prevalence with regard to the normative nature of the attribution process seems to be accompanied, however, in the course of the final phase of the Commission's elaboration process — and more decidedly after its final adoption in 2001 — by a remarkable degree of discrepancy between the attribution criteria — the tests or standards — embodied in the ILC's Articles, on the one hand, and the attribution criteria actually resorted to in international (and also national) decisions, notwithstanding the fact that such decisions remained and are allegedly based not only upon the Commission's normative concept of attribution but also, in a number of important cases, upon the (cited or uncited) attribution "norms" contained in the ILC's Chapter II Articles. Indeed, the post-Nineteenseventies discrepancy between the judicialand ILC tests manifests itself so widely, and in such a relatively short time lapse, that the judicial positions, while in principle theoreti-

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(1) *Supra*, para. 3.

cally based largely upon the normative construction (and not infrequently paying implied or explicit attention to the relevant ILC Articles), seem at times (ICJ pronouncements excepted) to approach *in concreto* (judging from the elements they consider relevant for attribution) a factual rather than a normative approach.

A similar discrepancy from the Commission's attribution criteria — although implicitly involving the normative concept — is also noticeable in the literature, a not negligible portion of which seems to take, *in concreto*, some distance from both the normative theory and the actual attribution criteria worked out by the ILC (2). This consideration applies especially to both the 1974-1996 and the 2001 ILC attribution "norms" covering the actions or omissions of private parties (the so-called *de facto* State organs). Despite the alleged codification of customary attribution norms, no harmony is visible in the case-law either. The latter, as well as the relevant literature, appear inconsistent and very controversial. Numerous contradictions emerge not only among the various decisions but also — as in *Nicaragua* — within one and the same judgment.

Be that as it may, the weight exercised upon the concept of attribution by the work of the ILC — particularly by Roberto Ago's decisive Third Report — suggests that whoever studies the relevant practice must distinguish the arbitral and judicial decisions following from those preceding the Nineteenseventies (3).

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(2) In the earlier period, namely from the times of Grotius and Vattel up to the inception of the ILC endeavours, the concept of attribution appears to be based upon a relatively strict adherence to the notion that a State's international person's delictual liability is only triggered under international law by the conduct of its *de iure proprio* organs. In the following period (including the ILC's thirty years' work), the attribution process concept seems to have been undergoing — and is probably still undergoing — a more or less gradual metamorphosis approaching the quasi-diametrically opposite notion that the prevailing criterion of attribution is the factual relationship of the acting or omitting individual(s)'s conduct with the State's international person's body.

Be it as it may regarding the historical development, the present stage is marked, in the literature (less in the cases) by the tendency to dis-assemble complex attribution phenomena that, although based upon the State's whole "effective organization", are subjected, in their fragmentation, to allegedly distinct supposed norms.

(3) As I am able to see them at the present stage, the main features of the more recent attribution decisions are the following:

i. Constant express or implied adherence to the normative concept;

ii. Occasional express or implied reference to the ILC's currently available (1974, 1996 or 2001) Articles;

iii. Significant (more or less remarkable) discrepancies in the applied tests or standards:

(*a*) between the tests applied in the ICJ's pronouncements, on the one hand, and the IUSCT, ECHR, ICTY and other adjudicating bodies' pronouncements, on the other hand;

It seems more practical to start with the pre-1971 decisions, that represented — as it should — the practice from which Ago, the main creator of the normative theory, took the first steps in the elboration of the draft attribution rules he proposed to the Commission in the course of that decade.

7. A study of the cases preceding the Nineteenseventies shows that attribution had been fairly constantly predicated on the basis of tests that, whatever the terms employed by commissioners, or arbitrators, were actually conforming *avant la lettre* with that "overall control" test that is generally looked at as an invention of the European Court of Human Rights (ECHR) in *Loizidou,* further developed in a few other cases and then confirmed by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Tadić*. That the use of that test preceded 1971 emerges clearly from those earlier judicial or arbitral decisions, mostly well-known and almost all reviewed in Roberto Ago's Third Report. It was, as it is, just a matter of reading it a little more carefully than it is generally done (4).

(*b*) between the said pronouncements tests, on the one hand, and the (current) ILC Articles tests, on the other hand;

iv. Significant discrepancies among the pronouncements in the degree of their persuasiveness, some pronouncements being, on analysis, of a higher or lower judicial quality than others;

v. Presence, in some instances, of inconsistent, contradictory attribution tests as well as the presence of multiple real or hypothetical tests, in one and the same pronouncement.

References to the ILC Articles, only implicit, perhaps, in *Hostages*, are explicit in *Nicaragua* and in *Genocide*. In the former case the ICJ referred to Article 8 (*a*) as provisionally worked out, on Ago's proposal, in the Nineteenseventies. In *Genocide* reference was made, by the parties' counsels and in the judgement, to Articles 8 and 4 as finally adopted by the ILC in 2001. In neither case the ICJ made any independent search of its own for evidence of a customary law of attribution. In *Nicaragua* and *Genocide* the Court takes it for granted that the cited ILC Articles — provisional as well as final — codified customary law.

References to the ILC products are also explicit in a number of ECHR, ICTY and ICTR decisions as well as in the decisions or reports of some international administrative bodies. Articles 8 and 4 come into consideration, for example, in *Loizidou*, in *Tadić* (Trial and Appeals Chambers) and other decisions of both the ECHR and the above-mentioned criminal tribunals.

(4) Of course, any theory or generalization (as well as any simple assertion or perception) of the factual nature of the attribution process (for the purposes of State responsibility), easily *inducible* from the uniform international practice of attribution preceding the Nineteenseventies, would have been inevitably swept away under the impact of the International Law Commission's juridical construction of what was then called imputation: a juridical construction allegedly *induced* by the study of the said practice, but actually *deduced*, I submit, from Roberto Ago's axiomatic definition of attribution (imputation, as it was then called), connected with his adherence to the

Had the Commission been less hasty and more observant, the tests it proposed from 1971 to 2001 would not be so much at variance from the tests constantly and almost uniformly applied by the previous decisions. Within that case-law — pre-1971 — one must register the almost total absence of any unambiguous reference to a normative approach to attribution. Arbitrators and commissioners looked simply at the evidence of a direct or indirect factual connection of the event complained of with the respondent State's (*rectius*: the respondent State's international person's) corporeal structure.

This is also manifest in Strisower's learned Report, discussed at the 1927 Lausanne session of the International Law Institute (ILI). Neither the Report, nor the comments and the debates thereupon, nor, finally, the text of the ILI's Lausanne Resolution on State Responsibility for Injuries to Aliens contain the least mention or hint at any international rules *other than those attributing responsibility (liability)*.

The pre-1971 cases I refer to include not only the well-known *Zafiro* (1925), *Youmans* (1926) and *Stephens* (1927), but also *Falcón* (1926), *García* (1926), *Roper* (1927) as well as a number of older cases such as *Jeannotat* (*US v. Mexico*, Thornton Umpire) (5), *Newton v. Mexico* (6), *Lanfranco v. Mexico* (7), *Amelia de Brissot*, *Ralph Rawdon, Joseph Stackpole and Narcissa de Hannover v. Venezuela* (8).

The facts involved in almost all these cases are episodes of serious violence against persons and/or taking or destruction of property, carried out either by mobs ineffectively or inadequately watched and thwarted by the police or by regular, irregular or auxiliary armed forces under the command of officers, or by regular or irregular military or police forces themselves. Among the most typical are *Zafiro*, *Youmans* and *Stephens* (9).

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questionable juridical notion of the States' international persons as *personnes morales*, and submissively accepted by the ILC despite the present writer's Second Report.

(5) MOORE, *History and Digest of the International Arbitrations to Which the United States has Been Party, etc.*, vol. IV, Washington, 1898, pp. 3672-3675.

(6) In the cited MOORE's *Digest*, vol. III, 1898, p. 1997.

(7) *Ibid.*, p. 1997. Both involved taking or destruction of property by troops or armed forces under an officer's command.

(8) Cases covered by the United States-Venezuelan Claims Commission (Convention of December 5, 1885), also in MOORE's cited *Digest*, vol. III, 1898, p. 2971.

(9) The decisive importance of delinquent soldiers being "under the command of officers" was also confirmed as a responsibility condition in the unsuccessful *Dunbar and Belknap v. Mexico* case (MOORE's cited *Digest*, vol. III, 1898, p. 2998 ff.), as well as in the equally unsuccessful *Charles Porter v. Mexico*, where the claim was rejected in view of the fact that the delinquent "marauders" were found to be "not 'Mexican authorities'", their actions being thus not attributable to the Mexican Government (MOORE's cited *Digest*, vol. III, 1898, p. 2998).

In *Zafiro* the action complained of was attributed to the United States on a merely factual basis and not on any juridical or normative consideration, namely on the only fact that the ship was under the command of the US Navy officers, obviously in control (10). The case is briefly commented by Ago in the 1971 Report as a premise to the formulation of his Article 8 on *de facto* organs (11). Assuming that *Zafiro* raised problems of attribution of the conduct of *de facto* organs there would be something to object about such a reading of the case (12). In the well-known and widely quoted *Youmans* case, the basis of attribution was obviously the Mexican State's overall control over the mob, inadequately checked, if not instigated, by the regular or irregular police and military personnel supposedly entrusted with the victims' protection (13). The *Stephens* case, decided by the Mexico-US Claims

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(10) *Zafiro* was a supply ship acting as part of a US Admiral's naval force and manned by a civilian (Chinese) crew under the command of a merchant officer and a United States naval officer, the complaint originating from a looting in Manila Bay carried out by the Chinese crew allowed ashore by the ship's merchant and naval officers (see *Earnshaw and Others (Great Britain v. United States)*, 30 November 1925, in *United Nations Reports of International Arbitral Awards* (UNRIAA), vol. VI, pp. 160-165, esp. p. 163. For the overall control, see pp. 161-162, the control ineffectiveness being stressed at p. 164).

(11) AGO, *Third Report*, cit., p. 264, para. 192. Draft Article 8 submitted in 1971 by Ago to the ILC concerned the attribution to the State of acts of private persons "in fact performing public functions or in fact acting on behalf of the State", the two hypotheses being dealt with in a single paragraph. The ILC adopted in 1974 on first reading an Article 8 substantially identical to that proposed by Special Rapporteur Ago, but separated the two hypotheses in two sub-paragraphs: the hypothesis of persons in fact acting on behalf of the State being covered by sub-paragraph (*a*) [see Annex to the present work]. For the sake of simplicity, we have chosen to refer, in the present work, to number 8 (*a*) also when speaking of Ago's Article 8 dealing with attribution of acts of private persons in fact acting on behalf of the State.

(12) The Chinese crew whose conduct was complained of was under the command of a first mate who, in his turn, was under the command of an American naval officer(s) (Captain Whitton and/or Ensign Pearson), the *Zafiro* "acting as a supply ship for Admiral Dewey's squadron". Considering the chain of command up to the naval officer and the Admiral, one can hardly look at the Chinese crew's conduct complained of as having been held on any "instructions" from above in the sense of Ago's understanding of Article 8 (*a*) in his *Nicaragua* Separate Opinion; nor, for that matter, under any "direction or control" according to the 2001 ILC Article 8. It was, essentially, a matter of omission by the commanding naval officer. It is difficult, anyway, to envisage the acting Chinese crew as a *de facto* organ of the United States. One could at most speak of a precedent of application of the 2001 ILC Article 8 ("or control") or an antecedent of the overall control test. Ago's imprecision proves the difficulty, if not absurdity, of formulating legal rules to cover such an indefinite variety of situations.

(13) *Youmans* (*USA v. Mexico*), in UNRIAA, vol. IV, p. 116. It was clear, according to the decision, that at the time of the attack on the supposedly protected foreigners the soldiers apparently controlling the mob "were on duty under the immediate supervision [...] of a commanding officer". According to Brownlie "In truth there is no autonomous 'preliminary question' of attributability or a special burden of

Commission (14), originated from the killing of an American citizen by the "irregular" Valenzuela, who factually engaged Mexico's responsibility, according to the Claims Commission, as a soldier, namely either as a *de iure* organ of the Mexican State (and not a *de facto* organ, unless from the standpoint of international law, or simply under the primary rule on the responsibility of States for the conduct of the members of their armed forces). Ago's citation of this case as a basis for his Article 8 (*a*) (15) is thus questionable.

Among the various less famous cases, *Falcón* originated from the killing of an unarmed Mexican national by gunfire from American soldiers (in contravention of American military regulations forbidding firing on unarmed persons) (16). In *García*, a Mexican girl had been killed by a shot from an American military officer on the American side of Rio Bravo del Norte (or Rio Grande) while she was crossing the river in a raft (17). *Roper* concerned the death of an American national who drowned in the Pánnco River while under assault, together with other fellow seamen, by Mexican policemen and private citizens (18). Similar to the latter cases are *Tribolet*, concerning the arrest and subsequent

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proof on the basis of the apparent absence of an 'act of State'. The facts of each case may give rise to particular evidential presumptions and burdens, as in the *Youmans* Claim [...], but no general presumption against attributability exists. Moreover, such a presumption would produce an odd result: the more bizarre and bloodthirsty the behaviour of the State organs (such as the militia in the *Youmans* Claim) [see Claims Commission's statement quoted by Brownlie at p. 146, and reported above], the easier it would be for the respondent State to escape responsibility" (BROWNLIE, *System of the Law of Nations*, *State Responsibility,* Part I, Oxford, 1983, pp. 164-165). Cases of armed individuals attacking and killing persons, or taking or destroying foreign property, acting under a commanding person identifiable as belonging to the armed forces or the police, mostly similar, although less dramatic, to *Youmans,* are *Jeannotat*, 1868, *US v. Mexico* (*Umpire Thornton*), in MOORE, *Digest*, cit., vol. IV, pp. 3672-3675; *Newton v. Mexico*, *ibid.*, vol. III, p. 2997; *Lanfranco v. Mexico* (*ibid.*, same page), both involving taking or destruction of property, or looting, by troops or irregular forces under an officer's command; also similar are the cases *Amelia de Brissot*, *Ralph Rawdon*, *Joseph Stackpole* and *Narcissa de Hammer v. Venezuela* (*ibid*., p. 2971).

(14) *Charles S. Stephens and Other (USA) v. United Mexican States*, Mexico-United States Claims Commission, 1927 Decision, in UNRIAA, vol. IV, pp. 265-268. In this case — considered by BARTOLINI, *Organi di fatto e responsabilità internazionale: recenti sviluppi*, *La Comunità internazionale*, 2001, p. 462, note 82, following the citation of that case by the *Tadić* Appeal decision as a precedent *not* requiring any instructions, imposition, request or direction by the State [Appeals Chamber's decision para. 122] — there was no question either of a norm such as Ago's Article 8 (*a*)'s "instructions", or of direction or control under the 2001 final version of that provision.

(15) AGO, *Third Report*, cit., p. 264, para. 192.

(16) *Falcón* (*United Mexican States v. USA*), in UNRIAA, vol. IV, pp. 104-106.

(17) *Teodoro García and Other (United Mexican States v. USA)*, *ibid.*, vol. IV, pp. 119-123.

(18) *Margaret Roper (USA) v. United Mexican States*, *ibid.*, vol. IV, pp. 145-148.

death of an American national, where it was "fully established that the latter was deprived of his life by individuals belonging to the armed forces of the State of Sonora commanded and accompanied by an officer of the forces in question", the victim's arrest having been ordered by the Secretary of State of the Government of Sonora (19); and the *Caire* case, concerning a French national's assassination by members of the Mexican armed forces, attributed to the United Mexican States on the ground, as stated by the umpire, of the principle, asserted by various authors (including Anzilotti) and by the International Law Institute in 1927 (20), of the State's responsibility for the conduct of its officials even where they acted in excess of their competence. Also in *Caire* the officials involved were members of the State's armed forces (21). Once more, in this case I see neither implied nor express references to legal rules on attribution.

A less dated relevant case is, of course, *Eichmann's* kidnapping in Argentina by Israeli agents, the latter being indicated as "citizens of Israel". A question of Israel's responsibility for the evident breach of Argentina's sovereignty was not brought to international adjudication. It was obvious, however, that the "action taken by citizens of Israel" was in fact generally acknowledged as an act attributable to the State of Israel (22).

The frequency, among the cases just considered, of a State's responsibility for the conduct of its military or police personnel calls for some reflection on the peculiarity of the cases falling in that category. This in the light of, on the one hand, the presumably prevailing overall control standard, and, on the other hand, the distinction — obviously and naturally stressed by the normative theory of attribution — be-

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(19) *Jesús Navarro Tribolet et Al. (USA) v. United Mexican States*, October 8, 1930, in UNRIAA, vol. IV, pp. 598-601.

(20) *Annuaire de l'Institut de droit international*, 1927, t. I, p. 501 ff., esp. pp. 507-508.

(21) *Estate of Jean-Baptiste Caire (France) v. United Mexican States*, in UNRIAA, vol. V, pp. 516-534.

(22) Argentina brought the matter before the Security Council that adopted a resolution on June 23, 1960 recognizing the violation of Argentina's sovereignty; but the two Governments, animated by a desire to give effect to the Council's resolution, "resolve[d] to regard as closed the incident which arose out of the action taken by citizens of Israel, which infringed the fundamental rights of the State of Argentina". See *Attorney-General (Israel) v. Adolf Eichmann*, in *Int. Law Reports*, vol. 36, 1968, p. 5 ff. The *Eichmann* case is commented, *inter alia*, by ROUSSEAU, *Affaire Eichmann-Arrestation et enlèvement en territoire argentin par des agents du Gouvernement israélien d'un ressortissant allemand recherché pour crimes de guerre*, *Revue générale de droit int. public*, 1960, pp. 772-786; and SILVING, *In re Eichmann: A Dilemma of Law and Morality*, *American Journal of Int. Law*, 1961, pp. 308-358.

tween attribution of responsibility and attribution of conduct. The *Case of Conduct of Armed Forces Members* falls under Article 3 of the 1907 Hague Convention as well as under Article 91 of the First 1977 Protocol to the four Geneva Conventions of 1949, according to which "[a] Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces" (23).

Conclusively, the pre-1971 arbitral decisions and cases — namely, the practice preceding the ILC work on the topic — confirm not only the essential absence of any mention of attribution norms by arbitrators or commissioners, but also the discordance from some of the ILC's attribution tests, notably the tests envisaged in 2001 ILC Article 8.

8. The most important piece of the post-1971 judicial decisions is generally admitted to be the ICJ's judgment on *Hostages* (24), where the Court recognized two stages in the submitted event, issuing attribution pronouncements generally viewed both as applications of un-quoted ILC products (25).

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(23) The matter is masterfully dealt with by Max Huber in his famous report of October 23, 1924, in the case of *Biens britanniques au Maroc espagnol,* in UNRIAA, vol. II, p. 639 ff. (*Rapport sur la responsabilité de l'Etat dans les situations visées par les réclamations britanniques*) where Huber, at p. 645, after admitting that the principle set forth in Article 3 of the Fourth 1907 Hague Convention must be considered applicable also "en dehors de la guerre proprement dite", concludes that that principle imposes upon States to exercise over their armed forces "une vigilance d'ordre supérieur" and remarks that "cette vigilance n'est que le complément des pouvoirs du commandant et de la discipline de la hiérarchie militaire". See CONDORELLI, *L'imputation*, cit., p. 210, footnote 242, who adds: "Voir aussi l'application de cette approche concernant les réclamations XXVI et XLI, dans M. Huber, 'Rapport sur les réclamations individuelles du 29 décembre 1924'" .

(24) 24 April 1980 Judgment, *I.C.J. Reports*, 1980, p. 3 ff.

(25) See in particular BARTOLINI, *Organi di fatto*, cit., p. 435 ff., and *Il concetto di "controllo" sulle attività di individui quale presupposto della responsabilità dello Stato*, in *La codificazione della responsabilità* etc. (Spinedi, Gianelli and Alaimo eds.), cit., p. 25 ff.; DOPAGNE, *La responsabilité de l'Etat du fait des particuliers: les causes d'imputation revisitées par les articles sur la responsabilité de l'Etat pour fait internationalement illicite*, *Revue belge de droit int.*, 2001, p. 492 ff.; CHRISTENSON, *Attribution of Acts or Omissions to the State*, *Michigan Journal of Int. Law*, 1990, p. 312 ff., at p. 333; WOLF, *Die gegenwärtige Entwicklung der Lehre über die völkerrectliche Verantwortlichkeit der Staaten*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1983, p. 489; CONDORELLI, *L'imputation*, cit.; ID., *The Imputability to States of International Terrorism*, *Israel Yearbook on Human Rights*, vol. 19, 1989, p. 233 ff., at pp. 238-240; DE HOOGH, *Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, The* Tadić *Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia*, *British Yearbook of Int. Law*, 2001, p. 255 ff.; EPINEY, *Die völkerrechtliche Verantwortlichket von Staaten für rechtswidriges Verhalten im Zusammenhang mit*

With regard to the first stage, the Court found that the militants' actions in seizing the United States Embassy could have been attributed to the respondent State only "if it were established that, in fact, on the occasion in question the militants acted on behalf [*sic*!] of the State, having been charged by some competent [*sic*!] organ of the [...] State to carry out a *specific operation*. The information before the Court does not, however, suffice to establish with the requisite certainty the existence at that time *of such a link between the militants and any competent [sic] organ of the State*" (26). The Court stressed that "it would be going too far to interpret [the] general declarations of the Ayatollah Komeini to the people or students of Iran as amounting to an authorization from the State to undertake the specific operation of invading and seizing the [...] Embassy [...]. The first phase, here under examination, of the events complained of [including the Tabriz and Shiraz attacks], shows that those events have been executed by militants not having an official character, and successful because of lack of sufficient protection" (27).

The Court did not fail, of course, to register the manifest breach of Iran's obligations to the United States, in that it failed to prevent and repress the attack and the holding of the hostages (para. 67).

Denied in the so-called first stage, the attribution of the attack and the seizure of the hostages to Iran were to be affirmed by the Court in the second stage in view of the Iranian authorities' more impressive involvement (paras. 73 and 74). Starting from Ayatollah Komeini's decree of 17 November 1979 (para. 73), the Government's conduct had been such, according to the Court, as "fundamentally to transform

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Aktionen Privater, Baden-Baden, 1991; FOLZ, *Bemerkungen zur völkerrechtlichen Beurteilung der Vorgänge um die amerikanischen Geiseln im Iran*, in *Staatsrecht-Völkerrecht-Europarecht*, *Festschrift H.-J. Schlochauer* (Münch ed.), Berlin, 1981, pp. 271-288, at p. 273; KRESS, *L'organe* de facto, cit., p. 93 ff.; SAVARESE, *Fatti di privati e responsabilità dello Stato tra organo di fatto e "complicità" alla luce di recenti tendenze della prassi internazionale*, in *La codificazione della responsabilità* etc. (Spinedi, Gianelli and Alaimo eds.), cit., p. 53 ff.

(26) *I.C.J. Reports*, 1980, p. 29, para. 58 (emphasis added). This language is obviously reminiscent of the 1974 Commentary to Article 8, notably paras. 2 ("real link"), 5 *in fine* and 8 ("in concert and at the instigation"), as well as the text's "on behalf" reiterated in the Commentary's para. 7, and "discharge a particular function" [or] "a particular duty", or "a given mission" (para. 8).

According to CHRISTENSON, *Attribution of Acts or Omissions*, cit., p. 312 ff., at p. 333, the ICJ would have implicitly applied Article 8. This in view of the later approval and adoption of the acts and their official continuation. There remains to be seen, here as well as in other cases, what is meant exactly by "operation" as opposed to the specific conduct in question.

(27) Judgment, paras. 59 and 60.

the legal nature of the situation created by the occupation of the Embassy and the detention of its [...] staff as hostages. The approval given [...] by the Ayatollah Komeini and other organs of the Iranian State and the decision to perpetuate [the occupation of the Embassy and detention of the hostages] translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible" (28).

Although it is generally viewed as conforming implicitly to the unquoted ILC language of Article 8 (*a*) and its 1974 commentary, the Court's attribution pronouncement for the event's first phase is not so close as *prima facie* it may seem either to the wording of the Article or to the said commentary. With regard to the text, the Court seems to have had no problem with the proper meaning of "on behalf" ("pour le compte"). In requiring express specific instructions for the militants, it seems notably to have given no thought to the fact that, as James Crawford was to point out in 1998, "a person may be said to act 'on behalf' of another person without any actual instruction or mandate from that other person" (29). Secondly, the Court reads the Article's commentary arbitrarily or absent-mindedly. While rightly referring to hypotheses of authorized or charged specific internationally questionable actions such as those alluded to in the 1974 commentary in para. 5 (like sabotage and abductions) and in the last lines of para. 8, such as "particular duty" and "given task at the instigation of [the State's] organs", it ignores, from that same para. 8, the hypothesis of person or persons [...] actually appointed [...] to discharge a particular (not necessarily internationally questionable and quite possibly public) function, or, from para. 3, individuals employed as police or armed forces auxiliaries (also not necessarily charged with questionable actions). The Court ignores as well the hypotheses of the same commentary's para. 4, that cites cases such as *Zafiro* and *Stephens*, where no trace can reasonably be found of authorizations or instigations from the

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(28) Para. 74, *emphasis added*. CONDORELLI, *L'imputation*, cit., p. 101 f., esp. p. 102 and notes 170-174, stresses in particular the closeness of the ICJ wording to para. 8 of the 1974 ILC Commentary to Article 8, a "language similar" to Ago's language in para. 15 of his separate Opinion in *Nicaragua*.

(29) CRAWFORD, *First Report on State Responsibility*, in *Yearbook of the Int. Law Commission*, 1999, vol. II, Part One, p. 40, para. 197. This broad reading by Crawford of Ago's expression "on behalf" is in my view inexplicably set aside by Crawford himself, when, with regard to *Nicaragua*, he seems to adhere to Ago's stricter interpretation requiring precise instructions on the specific conduct in question.

involved State's organs to commit the actions internationally complained of. While rightly implicitly requiring that the official "charge" should have preceded the conduct complained of, the Court remarks that in the case at hand the charge to occupy the United States embassy and seize the hostages should have emanated from "some *competent* organ of the State"(emphasis added), while the condition of competence is not mentioned in the 1974 commentary. That condition appears neither in the 1998-2001 version of Article 8 (despite the fact that that version replaces by explicit instructions, directions or control the 1971-1974 more generic "on behalf"), nor, for that matter, in the commentary thereto. Furthermore, a condition of competence of the charging organ was to become inconsistent with such provisions as the 1974-1996 Article 10 and the 2001 Article 7, where the organ's *ultra vires* conduct is explicitly qualified as attributable to the State. More importantly, the Court seems totally to ignore "the many different situations" envisaged by Ago in his Third Report within what he indicated as a "very wide" "range of possibilities" that included hypotheses like the following: "[i] private undertaking [...] to provide public transport, postal communications or some other public service; [ii] auxiliaries in official health units, the police or the armed forces; [iii] drivers of private vehicles [...] to carry troops to the front, etc. [...]; [iv] persons secretly appointed to carry out particular missions or tasks [...] which the organs of the State prefer not to assign regular State officials [...]; [v] 'volunteers' to help an insurrectional movement in a neighbouring country [...]; [vi] [i]n times [...] now past [...] governments granted charters to private companies [...] to carry out exploration and colonization [...]; [vii] entrepreneur(s) engaged to recruit foreign labour in an occupied country in violation of international law; [viii] doctors instructed to carry out experiments on prisoners [...]; [ix] persons secretly recruited to carry out espionage, sabotage, terrorism, abduction [etc.]." (30)

Para. 191 of the cited Report added that "[a]t the internal level the State often assumes responsibility for offences committed by [x] private persons exceptionally performing *public functions* in the place of *de jure* officials [...]. Similarly, the State is often considered responsible for the acts of [xi] private natural or legal persons commissioned to provide *a particular public service*, or [xii] of individuals or groups carrying out *any kind of mission* for the State [...], [t]he underlying principle requir[ing] that the criterion should be *the public character of*

(30) AGO, *Third Report*, cit., p. 263, para. 190 and footnotes 382-383.

the function or mission in the performance of which the act or omission contrary to international law was committed, [...] it being logical that the act of a private person who, in one way or another, is *performing a function or task of an obviously public character* should [...] engage the responsibility of the State. [...] The cases which have actually occurred [...] relate mainly to situations in which the activities of the persons concerned were especially liable to bring them into contact with foreign countries. The conduct [...] generating international responsibility is, first [that of persons] used as *auxiliaries in the police or armed forces*, or sent as "volunteers" to neighbouring countries; and, secondly, that of [xiii] persons employed to carry out certain assignments in foreign territory, which may or may not be acknowledged" (31).

In the presence of such a clear language, it is difficult to take seriously the narrow understanding of the "on behalf" test as instruction(s) *to commit the action or omission internationally complained of*. Directly covered by the "on behalf" in the sense of instructions — or should one say "*specific* instructions"? — would presumably be only such (specific) tasks as those described, under Roman (iv), (v), (vii), (viii), (ix) and perhaps (xiii). Only for such hypotheses could one consider "on behalf" as implying specific instruction(s). According to this reading, the "on behalf" scope could have easily been interpreted broadly enough virtually to meet the past arbitral trend in the direction of broader control tests. The only examples mentioned in paragraph 191 (last and final parts) where the conduct internationally complained of seems to be almost directly envisaged in the entrusted "tâche" or "mission" are those involving action abroad, such as those of private persons or groups sent as "volontaires" in neighbouring countries or "agissements de personnes chargées de l'exécution de certaines missions, avouables ou non, en territoire étranger que l'on [in judicial and arbitral decisions] a pris en considération pour les attribuer à l'Etat en tant que *faits générateurs* d'une responsabilité internationale" (32). Except for the latter hypotheses (here the "on behalf" may well, in given circumstances, involve a specific instruction to carry out *a given misdeed or a series thereof*) the only conceivable instructions (unmentioned, indeed, in the paragraph under review) relate *to the generally (initially) entrusted task, service, mission and not the specific act[s] or omission(s) that could trigger the State's liability.* The private parties'

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(31) Excerpts from the cited *Report*, p. 264, para. 191 (emphasis added).

(32) Ago's own French, concluding para. 191 of his *Third Report* (AGO, *Troisième rapport sur la responsabilité des Etats*, in *Annuaire de la Commission du droit international*, 1971, vol. II, 1ère partie, p. 279).

conducts covered by the "on [the State's] behalf" are ... *les ensembles* of the various conceivable entrusted "tâches" or "missions" *in general*, not the person's or persons' actual misdeeds occurring *in the course* of the task's or mission's performance.

Regrettably, a rather different picture of "on behalf" was to be drawn — by Ago himself or someone else — in the ILC 1974 commentary to Article 8 (*a*). Although the article's relevant language had remained the same as that of 1971, that commentary has considerably slimmered. Less emphasis is put on those *public "services" or "functions"* that were so generously described in Ago's 1971 Third Report; and the commentary leaves entirely out of the picture (drawn in para. 3 from practice) such items as those principally listed in the above indented passages from the Third Report's paras. 190-191. Considering a certain confusion characterizing the commentary in question, — hardly consistent with Ago's precise language — I emphasize hereunder in the footnote its main passages (33).

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(33) "[Article 8, subpara. (*a*)] refers to persons or groups of persons who [i] have committed certain acts when in fact prompted to do so by organs of the State or of one of [its subdivisions] or who have been [ii] instructed by such organs to perform certain functions or certain activities, though not by way of formal appointment as an organ [such] hypothesis intended by the Commission mainly to cover cases in which the organs of the State supplement their own action and that of their subordinates by the action of private persons or groups who act as "auxiliaries" while remaining outside the official structures of the State. In the same context the Commission wished to deal with the familiar cases in which the organs of the State or of one of [its subdivisions] prefer, for varied and in any case self-evident reasons, not to undertake certain duties directly or not to carry out certain tasks themselves. They [.....] call upon [ii] private individuals or groups of private individuals to take on the duties and tasks in question [without] becom[ing] *de jure* organs of the State or of the other entities mentioned". (The Commission also bearing in mind the principle of effectiveness in the international legal order and the necessity take into account, in the cases contemplated, the existence of a real link between the person "performing the act" and the State machinery rather than the lack of a formal legal nexus between them). "The conduct in which the persons or groups in question thus engage in fact on behalf of the State should therefore be regarded under international law as [iii] acts of the State: that is to say, as acts which may, in the event, become the source of an international responsibility incumbent on the State. The validity of this conclusion is confirmed by international judicial decisions and international practice, even though the former have *only occasionally* had to deal with the acts of the persons referred to in [the present] sub-paragraph (*a*). The cases which have actually arisen in international life relate mainly to situations in which the activities of the persons concerned were especially liable to bring them into contact with foreign countries. The main forms of conduct which have been taken into consideration for attribution to the State as acts generating international responsibility are, first, the conduct of private individuals or groups of private individuals who, while remaining such, are employed as auxiliaries in the police or armed forces or sent as 'volunteers' to neighbouring countries, and secondly, the acts of persons employed to carry out certain emissions in foreign territory".

The commentary is not exempt from obscurities. One of the most evident of these is the contradiction between the notion — in points i and ii — of actors "who have committed *certain acts* when in fact *prompted to do so*" — the prompting implying actual or even express instruction(s) to carry out acts involving liability — on the one hand, and the notion — in points iii and iv — of actors called "*to take duties or tasks*" in the performance of which *acts may* ("in the event") *occur* that "become the source of an international responsibility" of the State, on the other hand: where no prompting to commit any specific acts seems to be envisaged. Quite perceptible, though, is the blurring of Ago's 1971 precise dichotomy of the just-mentioned hypotheses and the richness of the examples he quoted (34). Despite that imperfection, however, the 1974 commentary did not cancel the essential hypothesis of *entrustment of lawful tasks* to private parties. Notwithstanding this blurring, para. 3 of the commentary to the article does, on the whole, distinguish the hypotheses of "persons used as auxiliaries in the police or armed forces or sent as volunteers to neighbouring countries", on the one hand, and "persons employed to carry out certain assignments in foreign territory, which may or may not be acknowledged", on the other hand. The difference between the two "groups of situations" is

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As an example of the first set of situations, mention is made of the *Zafiro* and *Stephens* cases. With regard to the second set of situations, reference is made to the *Black Tom* and *Kingsland* cases, and the *Rossi*, *Jacob*, *Eichmann* and *Argoud* cases of abduction from foreign territory.

"In addition to the two sets of situations just mentioned, reference may be made to certain positions taken on the occasion of incidents caused by the conduct of the press, radio, television, etc. It has happened that the country considering itself injured has claimed the existence of international responsibility for such conduct on the grounds that, in the country where the conduct occurred, the press and other mass information media were really controlled by the Government.

It does not seem necessary to dwell on further specific examples of the application of the principle stated in sub-paragraph (*a*) of the present article, since this principle is practically undisputed. The attribution to the State, as a subject of international law, of the conduct of persons who are in fact acting on its behalf, though without thereby acquiring the status of organs either of the State itself or of some other entity empowered to exercise elements of the governmental authority, is unanimously upheld by the writers on international law who have dealt with this question", para. 8 of the commentary making "quite clear" the necessity of evidence "that the person or group of persons were actually appointed by organs of the State to discharge a particular function or to carry out a particular duty, that they performed a given task at the instigation of those organs. Where such proof is lacking, the conduct of the persons concerned can only fall under the provisions of a subsequent draft article which is to deal with the conduct engaged in by individuals or groups of individuals as private persons. For these reasons the text adopted by the Commission for Article 8, sub-paragraph (*a*), begins with the words 'it is established'" (ILC Commentary to Article 8 in *Yearbook of the Int. Law Commission*, 1974, vol. II, Part One, pp. 283-285).

(34) This is even stressed in the 1974 ILC commentary.

emphasized by the reference to *different kinds of cases* (35). It is thus difficult to understand, also in light of the above-quoted parts of paras. 190-191 of Ago's Third Report, how the proper interpretation of "on behalf" could have been — for the purposes of the ILC's codification of attribution — first amputated by the 1974 (stingy) commentary, then narrowed down to "instructions", later totally obscured by *Nicaragua*'s para. 115 (first part), not to mention, finally, the ..."authentic" *coup de grâce* administered by Ago himself.

It is not surprising, given the scarce importance the Court attributed to the width and flexibility of an expression such as "on behalf" — especially in light of Ago's 1971 above-quoted illustration –, that the Court's 1980 first stage attribution pronouncement was so decidedly axed on the search for evidence of a specific, formal governmental instruction to attack the US Embassy ("charged ... to carry out a *specific* operation"), that not the least hint was made, in the judgment, to the possibility that the attribution of the attack to the respondent State be made on the simple basis of the Ayatollah Khomeini's proclamation that it was "*up to* the dear pupils, students and theological students to *expand* with all their *might* their *attacks against the United States* [...] so they may *force* the United States to *return* the deposed and criminal shah, and to *condemn their great plot*" (emphasis added) (36). I wonder whether the Court would have really gone too far if it had considered such an incendiary language on the part of the revolution's charismatic leader, addressed as it was explicitly to a portion of the population that was, by age and education, the most likely to be tempted to resort to the kind of excesses they actually carried out, quite sufficient to justify attribution of the attack to the State. The more so as the attack — in an obviously well-known section of the State's capital — is said (by the Court itself) to have lasted as much as three hours.

Be that as it may have been, it was indeed the ICJ's arbitrarily narrow interpretation of "on behalf" in *Hostages*'s first stage that

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(35) The first group's hypotheses were illustrated by *Zafiro* and *Stephens*, to which one can comfortably add *Youmans* and numerous other instances among the cases reviewed at para. 7 *supra*. The second group was illustrated by the German sabotage cases (*Black Tom and Kingsland*) as well as a number of abduction cases in foreign territory (including *Rossi*, *Jacob*, *Eichmann* and *Argoud* (all in Ago's Third Report, para. 192)). In reviewing the first group of cases it has been noted that they involved not an "on behalf" test in the (narrow) sense of "instructions", but, rather, either overall control — a logically possible extensive understanding of "on behalf" — or simply the *de iure* (internal) organs, especially in the case of members of the armed forces and their overall controlled auxiliaries. The cases of the second group are obviously another matter.

(36) *I.C.J. Reports*, 1980, p. 30, para. 59.

represents the earliest and most important signal in support of an interpretation of Article 8 (*a*) that, judging from his 1971 presentation of that provision, had that far not been surely in the mind — or the pen — of Roberto Ago. The Court's members obviously had had no notion, when they demanded specific instructions, of paragraphs 190 and 191 of Ago's (1971) Third Report.

A meritorious feature of this part of the judgment is that the Court did not claim yet that it was applying a rule of a customary law of attribution. There remains the fact that out of mere superficiality the most important international judicial body opened the way to a restrictive trend that was to have a substantial negative impact on the Commission's work on one of the most crucial among the "norms" of the draft. It is from the ICJ's narrow interpretation of "on behalf" as implying the necessity of specific instruction(s), that came about, in addition to a questionable precedent for *Nicaragua* and in contrast with the latter, the narrowing down of the 1998 attribution tests that was to be represented by the phrase "in carrying out the conduct" (37).

Moving to the event's second stage, and leaving out for the moment the relationship of the relevant Court pronouncement with the first stage negative finding — a relationship to be taken up further on — my understanding is that the ICJ was quite correct in viewing the State authorities' unambiguous actions as a transformation of the situation into (i) a direct involvement of the State in the conduct complained of and (ii) the acquisition by the militants either of the condition of *de facto* organs or of a status very close, if not equivalent, to that of *de iure* State organs under the inchoate legal order of the Islamic Republic. Considering the high-ranking State authorities' massive and penetrating involvement accompanied by precise, on-going directions for the continuation of the job, I find the second alternative more consonant with the circumstances. It seems easily presumable that the Government's intervention created, at one and the same time, the elevation of the militants to a status of *de iure* organs and a close cooperation and somehow continuous chain of causes and effects between the conduct of the intervening officialdom and that of the militants that rendered attribution to the State of the whole operation under the "model" of then Ago's Article 5 (or the 2001 Article 4). The ICJ's qualification of the militants' status as that of "*agents* of the

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(37) It seems rather odd, actually, that despite inspiring itself in *Hostages* from the current ILC products, the Court proceeded on its own legs leaving out, precisely, the pages of the 1971 Third Report from which it could have drawn a more valuable teaching.

Iranian State for whose acts the State was internationally responsible" (para. 74) is a not insignificant detail in support of the notion of the militants as *de iure* organs. Although not infrequently used as a synonym of organ, the term "agent" sounds closer to a *de iure* rather than a *de facto* connection with the State's person.

Be that as it may, one could not exclude that the second stage "transformed" situation brought about instead the acquisition by the militants of the far less formal condition of persons *in fact* operating for the Iranian State: a condition more easily reconcilable, perhaps, with the uncertain condition of the revolutionary legal order and the informality of the actions by which the State's authorities intervened at the side of the militants. Therefore Ago's Article 8 (*a*) could justify the attribution, as well as Article 5 (38).

The views of commentators on the case's second stage vary more considerably than those expressed with regard to the first.

It should be stressed, in view of the further developments of the present article, and subject to a proper checking of the writings alleging the "transformation" of private persons into State organs, that: (i) "transformation", in the Court's language, referred to the *situation* (not to the militants); and (ii) the militants became *de iure* State agents under Iranian law while remaining *de facto* (or simply factually) organs (as well as the organs of any State from the standpoint of international law), and not just *de facto* organs by way of any "supplementary role" of international law (39).

That the "transformation" was envisaged by the ICJ with reference to the militants (rather than just to the situation) *seems to be asserted* by Condorelli, Kress and Dopagne. I wonder, though, whether (in this and all the similar cases) it is a matter of "transforming" (on the part, supposedly, of international law — Simma) into organs or, more simply, *the persons' conduct becoming — being, simply — a factual component of the State's conduct*, the private party's or parties' conduct being an element — precedent or subsequent according to the case — of that (always) complex fact which is the State's unlawful conduct. In the *Hostages* case, the "official" element or elements (the authorities' actions, attitudes or omissions) follow, or are intertwined with the allegedly "private" element, this one being, in most cases, contemplated

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(38) This is likely to be one of the not infrequent cases where attribution could be pronounced on the basis of two or even more of the ILC's alleged attribution "norms".

(39) The expression is Simma's, Report as Chairman of the ILC Drafting Committee in 1998, in *Yearbook of the Int. Law Commission*, 1998, vol. I, p. 289, para. 77.

by the 2001 ILC Article 8, as the last in the "State conduct complex chain". The prevalent view seems to be that the Court's pronouncement adhered also here to the ILC's position under the 1971-1974 Article 8 (*a*) (40). Account should also be taken of the less orthodox, more articulate, interesting views expressed by Wolf and Epiney. The former (41), who thought, according to Kress, that "l'effet encourageant de l'approbation officielle [...] aurait suffi pour l'imputation en l'espèce" (42), seems to me to express himself, in the summary of his 1983 article, in a more articulate way. As I read that summary, Wolf maintains that there was really no reason to look, with regard to the misdeed's second phase, at the "act of the State". Although the ICJ resorted to the "act of State approach" in order to present "a clear and uncomplicated line of argument", a detailed examination of the events leads to the conclusion that, contrary to the Court's opinion, "contemporary international law does recognize in certain cases State responsibility for the conduct of private individuals", particularly with regard to the protection of foreign diplomats and diplomatic missions. There was thus no distinction, if I understand correctly Wolf's summary, between the two phases of the crisis, particularly no reason for a "qualitative change from an originally private to an official State action". In other words, subject to the above reservation, Wolf seems to see little or no point in attributing the militants' misdeeds to Iran, whose responsibility derived directly from the [Iranian State's] organs failure to protect [and punish?], the only international delict being that of Iran's legal organs [he also thinks perhaps of a "revolutionary Iranian order"?] for failure to protect etc., and for the encouragement

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(40) CHRISTENSON, *Attribution of Acts or Omissions*, cit., p. 312 ff., at p. 333 and the same author's intervention in *ASIL Proceedings*, *84th Annual Meeting*, 1990, pp. 51-59, at p. 54; CONDORELLI, *L'imputation*, cit., pp. 102-103 (who speaks not only of "application d'une *netteté exceptionnelle*" of the ILC products but also of "*transformation* de particuliers en agents de l'Etat" (pp. 101 and 102-103); DOPAGNE, op. cit., p. 497; KRESS, *L'organe* de facto, cit., p. 93 ff.

My view that the militants probably had acquired the status of organ seems to find some comfort in de Hoogh's doubt as to whether such was the case or whether the situation had remained within the scope of Article 8 (*a*) (DE HOOGH, *Articles 4 and 8 of the 2001 Articles*, cit., p. 255 ff., at p. 279). The same author cites Christenson's above-mentioned statement in *ASIL Proceedings*, 1990, for preferring the second alternative.

(41) WOLF, *Die gegenwärtige Entwicklung der Lehre über die völkerrectliche Verantwortlichkeit der Staaten*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 43, 1983, p. 489.

(42) KRESS, *L'organe* de facto, cit., p. 103. According to Kress, Wolf would also have maintained that "la notion même de l'organe *de facto* est sans fondement", *ibid.*, p. 103, note 38. See also KRESS, *Gewaltverbot und Selbstverteidigungsrecht*, Berlin, 1995, p. 245.

to the militants. The Court should have thus applied according to Wolf — I would assume — the ILC's 1973 Article 5 (or 2001 Article 4) on *de iure* organs (43).

Another (unorthodox) position seems to be that of Astrid Epiney, who finds contradictions in the ICJ's reasoning (second phase) and seems to question — as well as in other cases she refers to — the relevance of the ILC's attribution Articles 5-10, none of which was actually mentioned by the Court (44). Considering her particularly emphasized rejection of the applicability of Article 8's "on behalf" on the ground of the highest Iranian authorities' joining the militants and using them for the State's purposes (45), I believe her (not always very clear) position to be not distant from the view I prefer that the militants had acquired, in the second phase, the quality of State organs within the Iranian revolution's inchoate legal system. It is also worth noting that Epiney emphasizes (46) the non-binding nature of the ILC "norms" ("nicht als solcher eine Völkerrechtsquelle bildet").

Back to orthodoxy, another interpretation is that offered in the *Tadić* Appeal judgment where, in addition to adhering to the ICJ's narrow interpretation of "on behalf" (as requiring, for the first phase, specific instructions), the Appeals Chamber assumes, groundlessly in my view, that at the second stage "according to the Court, the militants became *de facto* (*sic*) agents" (the Court having said just "agents") (47).

The present writer's view is that the *Hostages* case's second stage shows that the militants were more than sufficiently legitimized, at the highest and intermediate echelons of the Iranian State's (revolutionary) fabric — and *legal order* — a legal order that was currently in the

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(43) But I refer especially to the author's own summary at pp. 535-536.

(44) Epiney, *Die völkerrechtliche Verantwortlichkeit*, cit., p. 182 ff. Epiney's views are referred to by Kress, *L'organe* de facto, cit., at p. 103, footnote 40, where he addresses the issue of "transformation" as commented by Epiney. In Kress's own words: "l'interprétation de l'arrêt par A. Epiney, op. cit., 187 s., va dans la même direction de la Chambre d'Appel dans l'affaire Tadić. Mais dans le détail l'interprétation par cet auteur soulève des questions. D'un côté elle parle de la transformation des individus en des instruments de Khomeini (p. 186 s.) — d'autre part elle insiste que la Cour ne s'est pas fondée sur un contact entre Khomeini et les individus et que ces derniers ont continué d'agir suivant leur décision autonome (p. 182 s.). Il n'est pas clair non plus dans quel sens précis A. Epiney utilise le terme 'contrôle'. A un moment de l'analyse (p. 186) l'auteur parle du (simple) pouvoir de contrôle des autorités iraniennes comme l'élément décisif". Kress himself speaks of "transformation des individus en des instruments de Khomeini".

(45) Epiney, op. cit., pp. 187-188.

(46) *Ibid*., pp. 183-184.

(47) International Criminal Tribunal for the Former Yugoslavia (ICTY), *Tadić* Appeal Judgment (*infra*, para. 10), p. 57, para. 133, note 25.

naturally convulsive but consolidating transformation process in the aftermath of the revolution —, for them to have become under Iranian municipal law *de iure* agents or organs of that State, while obviously remaining, under international law, factually organs of the Iranian State's international person just as well as the organs of any other State's international person. It is incredible how far some scholars seem able to go to twist the facts of a case to support a (totally) groundless theory. They remind one of Erasmus Darwin's above-quoted dictum.

Paragraphs 73-74 of the *Hostages* judgment describe not less than five or six episodes (from 17 November 1979 to 23 February and 7 April 1980) in which egregious elements of the fabric of the Iranian State fully and directly took moral, intellectual and political part, in unison with the militants, in the misdeeds complained of. There was no reason, therefore, to bring up what Kress describes the *de facto* organ "general rule" (implicitly adhered to, perhaps, in Condorelli's instigation theory) ([48]). The acting group was a *de iure* organ of the Iranian State from the standpoint of the latter's consolidating legal system. If it was a *de facto* organ from the standpoint of international law, it was such not because international law so qualified it, but simply because, as just stressed, the whole organization of any State is *de facto* from that standpoint, any single element of the State's structure participating of that same quality: a point on which Ago's Third Report is very clear.

Kress's melancholic conclusion is that "l'affaire des ôtages [2nd phase] n'a pas entièrement (*sic*) clarifié le contenu précis (*sic*) de la règle générale de l'organe *de facto*" ([49]), a blur on the normative theory of which he is one of the main adherents. Another blur is the variety of the comments expressed (all by normativists) on both the case's stages. Some clarification, however, does emerge from the Court's first stage attribution pronouncement as well as from the prevailing comments: in the sense, though, that the attribution test for the conduct of persons

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([48]) Regarding the second phase, de Hoogh says that "the ICJ considered an even more far-reaching decree of the Ayatollah [...] in which it was stated that the Embassy and the hostages would remain as they were until the United States had returned the Shah for trial and returned his property to Iran" (de Hoogh quotes the ICJ judgement, p. 34, para. 73). De Hoogh continues by noting that according to the Court "this and other statements transformed the legal nature of the situation, translated occupation [...etc.] into acts of Iran, and turned the militants into 'agents' of the Iranian State. From the judgment it is not clear what status the militants obtained as 'agents' of Iran. Did they become organs? Or did their acts fall under the scope of Article 8 (*a*)? Special Rapporteur Crawford, and with him the ILC, has interpreted the case as a separate cause for attribution under the heading of 'adoption' of conduct by the State (Article 11)" (DE HOOG, *Articles 4 and 8 of the 2001 ILC Articles*, cit., p. 279).

([49]) KRESS, *L'organe* de facto, cit., p. 103.

or groups of persons not vested with formal (*de iure*) organ status was (for the ICJ) or should be (according to commentators) confined within the narrow requirement of specific State instructions ([50]).

9. Although the *Nicaragua* attribution pronouncement draws presumably some inspiration from the *Hostages* first stage in denying attribution of misdeeds of *contras* to the United States, one is in the presence here of a substantially dissimilar judicial reasoning.

In the first part of the judgment the Court discusses the *contra* force's nature and relationship with the United States (a discourse presenting no resemblance with the *Hostages* case) taking what is, in my view, a bland attitude on the degree to which the United States was responsible for a group of military and paramilitary personnel that had grown from the size of a few hundreds to about twelve thousand men (paras. 93 ff., esp. paras. 106-122) and introduces an ambiguous concept of a United States "potential for control" over the force (paras. 110 ff.) that will be taken up further on. The key point with regard to the general issue of the United States-*contras* relationship is that after proposing, in para. 109, "to determine [...] whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government or as acting on behalf of that Government", the Court stated, in that same para. 109, that since "the only element of control that could be exercised by the United States"

([50]) The concordance of the literature with the Court's restrictive attribution pronouncement in *Hostages* is well expressed in CONDORELLI's *L'imputation,* cit., p. 201 f. and notes thereto, where he first emphatically remarks (quoting para. 59 *in fine* of the judgment) that the Court "a fait une application *d'une netteté exceptionnelle* [my emphasis]" first in considering non official the militants' attack in the initial phase, second, in considering the action attributable due to "le sceau de l'approbation officielle" (para. 73 of the judgment), to the approval and the decision to perpetuate, such elements causing "les faits en question 'ont pris le caractère' d'actes [de] l'Etat" (para. 74).

Analyzing the ICJ's 1980 and 1986 implied or explicit applications of ILC products Condorelli seems to espouse (op. cit., p. 101 f. and footnotes) the view of those "qui souhaitent voir la [CDI] employer, pour caractériser la situation, un langage moins vague que celui utilisé jusqu'à présent dans les articles 8 et 11" and expresses a preference for Riphagen's suggestion to replace "pour le compte" by "de concert et à l'instigation" d'un organe de l'Etat, "voire même — afin d'être encore plus précis — 'conformément aux instructions et sous l'autorité' (ou le 'contrôle effectif') de cet organe". Riphagen's proposal as well as the quoted author's approval thereof are significant elements of the trend that led first to Ago's apostasy of 1986 and finally to the 1998 addition to the three revised tests of Article 8 (instruction, direction, control) of the restrictive phrase "in carrying out the conduct".

[was] "cessation of aid, [p]aradoxically this assessment serve[d] to underline, *a contrario*, the potential for control inherent in the degree of the *contras'* dependence on aid. Yet, despite the heavy subsidies and other support provided to them by the United States, there [was] no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf" (end of para. 109).

The Court concluded this part of its reasoning by the rejection of Nicaragua's claim that the *contras* were a US Government's creation and a manifestly cautious evaluation of the degree to which the United States had been involved, in addition to the growth, also in the training and support of the force. My impression is that if the Court is formally correct in denying a US creation and a consequent "equation" with US Government organs, it moves on a less steady ground when it also denies that the *contras* were in fact operating as a US instrument, or, to use that doctrinally abused term, a *de facto* US organ. As noted by a number of commentators, for example, there was no question that the United States were contravening the prohibitions of the threat or use or force and intervention as well as directly, *also* through the *contras*, little mattering whether one attributed to the United States the *contras*' conduct breaching those prohibitions, or simply considered that aspect of the *contras*' operations embodied, so to speak, into the US organs' direct breaching of the twofold prohibition.

The problem of attribution of *contras*' conduct arose instead more specifically, as adverted by the Court, about that force's members' humanitarian law violations complained of by Nicaragua (51). And it is there that a language appears distantly recalling *Hostages* and involving more or less clearly some of the current ILC language.

The first point made by the Court in that respect is to deny attributability of the *contras*' misdeeds due to the fact that it was not proved that the United States had "*directed or enforced [ordonné ou imposé]* the perpetration of the acts contrary to human rights alleged by the applicant State" (emphasis added) (52).

Secondly, the Court considers — a few lines below the above-quoted phrase — that "for the *contras'* conduct to give rise to legal responsibility of the United States it would *in principle* have to be

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(51) According to Nicaragua's attorneys "any offences which they [the *contras*] have committed would be imputable to the Government of the United States, like those of any other forces placed under the latter's command", *I.C.J. Reports*, 1986, p. 64, para. 114.

(52) *I.C.J. Reports*, 1986, p. 64, para. 115.

proved that that State had *effective control* of the military or paramilitary *operations in the course of which the alleged violations were committed*" (emphasis added) (53).

A third differently worded attribution standard is that used by the Court with regard to Nicaragua's complaint (always for *contras* misdeeds) based upon the FCN Treaty's "equitable treatment" provision. In that regard the Court stated that "it [...] is not satisfied that the evidence available demonstrates that the *contras* were 'controlled' by the United States *when committing such acts*" as those complained of by Nicaragua with regard to the treatment of its citizens. "As the Court has indicated (paragraph 110 above), the exact extent of the control resulting from the financial dependence of the *contras* on the United States authorities *cannot be established*; and it has not been able to conclude that the *contras* are subject to the United States *to such an extent that any acts they have committed* are imputable to that State (paragraph 115 above). Even if the provision for 'equitable treatment' in the Treaty is read as involving an obligation not to kill, wound or kidnap [...] — as to which the Court expresses no opinion — those acts of the *contras* performed *in the course of their military or paramilitary activities* in Nicaragua are not conduct attributable to the United States » (54).

To begin with para. 115, the Court uses here a different language to indicate the object of the State's involvement test. Under the "directing" or "enforcing" test, the object of the State's involvement is "the *perpetration of the acts* contrary to human rights" (emphasis added); the object of the "effective control" test are "the military or paramilitary *operations in the course of which the alleged violations were committed*" (emphasis added). It is difficult to find the relationship, within para. 115, between the statement that there was no evidence that the United States had "directed or enforced" the "perpetration of the [violations in question]" ("ordonné ou imposé la perpétration") with the statement that "it would in principle have to be proved that [the

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(53) *I.C.J. Reports*, 1986, p. 65, same para. 115 *in fine.*

(54) Para. 277, at p. 139 of the judgment (emphasis added). The following para. 278 concludes the discussion of Nicaragua's allegation that the United States were liable "for loss or damage to its commerce, the latter term to be understood in its broadest sense", inflicted on it "by the actions of the *contras*" by the following: "However, as already noted (paragraph 277 above) the Court has not found the relationship between the *contras* and the United States Government to have been proved to be such that the United States is responsible for all acts of the *contras*" (para. 278 *in fine*, at pp. 139-140).

US] had the effective control of the military or paramilitary operations in the course of which the violations were committed" (55).

Whatever the Court intended by that "in principle", one thing is the proof or lack of proof that the United States had *directed or enforced the specific contras' misdeeds*, another thing to prove or not that the US had exercised an *effective control of* (or effectively controlled) *the operations in the course of which the misdeeds had been committed*. The first test's object presupposes a specific choice of misdeeds (and consequent direction or enforcement); the second test's object implies at most tolerance of unspecified misdeeds (56).

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(55) Judgment, para. 115 *in fine*.

(56) DOPAGNE, *La responsabilité de l'État*, cit., wonders how the two hypotheses exactly differ (p. 509) where he cites SIMMA, *The Work of the ILC at its Fiftieth Session 1998*, *Nordisk Journal of Int. Law*, 1998, pp. 452-453. It seems that Dopagne, op. cit., at p. 497, makes an assimilation of the two tests, even though he seems to overstate what he calls Ago's "approval", *tout court* ignoring here Ago's criticism of the "introduction" (by the Court) of the "effective control" test (quoting from Ago's Opinion only the phrase requiring that the *contras* be "spécifiquement chargés [...] de remplir une tâche ponctuellement déterminée" (p. 188, para. 96, of the Opinion).

As noted further on, the *Tadić* Appeal judgment's critical analysis of *Nicaragua* curiously joins other commentators in reading the two tests as identical without paying attention to the objects' difference. PALCHETTI, *L'organo di fatto dello Stato nel diritto internazionale*, Milano, 2007, p. 103 ff., sees two criteria (confirmed, he states, in *Congo* and *Genocide*). I cannot find, though, in his pages, a mention of the "directed or enforced" considered by the Court in the first part of the famous para. 115.

KRESS, *L'organe* de facto, cit., at p. 104 ff., especially p. 105, sees the two different readings of para. 115, accepting the *Tadić* Appeal: "l'arrêt Nicaragua ne présente pas toujours une argumentation cohérente [sur] l'imputation" (p. 106). Kress seems to believe that *Nicaragua* does not explain whether "l'idée que l'instigation qualifiée/le contrôle effectif constitue la condition nécessaire et suffisante pour l'imputation". According to Kress, "il n'est pas du tout exclu d'en tirer des critères alternatifs: la création d'un groupe pour les fins de l'exécution d'une série d'actes s'intégrant dans un plan général et la participation à la préparation, au commandement, au soutien et à l'exécution de l'acte" (KRESS, op. cit., p. 107).

On the "control" issue it is significant that Nicaragua refers to it not only in para. 115: "[a]ll the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of [the violations] alleged by [Nicaragua] [...] [s]uch acts could well be committed by [*contras* members] without the control of the United States. For this conduct to be attributable to the [US] it would in principle have to be proved that that State had effective control of the [...] *operations* in the course of which the alleged *violations* were committed" (emphasis added) (end of para. 115). An implied (*avant la lettre*) rejection of that "overall control" test that had already been resorted to in a number of cases preceding *Nicaragua*, as well in the *Tadić* Appeal judgment (not to mention the abundant subsequent decisions), appears at the outset of the following para. 116, where the Court "does not consider that the assistance given by the [US] to the *contras* warrants the conclusion that these forces are *subject to the [US] to such an extent* that any act they have committed are imputable to that State". Similarly, in para. 277, rejecting Nicaragua's claim that the treatment of [Nicaraguans]

Whichever the correct solution ought to be about attribution (and I am inclined to believe, as Boyle does, that the United States was substantially involved in too many ways and extents with the *contras*' very existence and operations for the latter's misdeeds not to be attributable to that Government), it would be difficult not to agree with the remark (in Ago's Separate Opinion) that the effective control test, added in para. 115 by the ICJ's majority, could not be equated to the direction or enforcement test.

The search for consistency is not more successful in para. 277. If the replacement of activities for operations is irrelevant, an explanation is called for where the Court "is not satisfied that the evidence [...] demonstrates that the *contras* were 'controlled' by the United States when committing [the] acts [...] complained of". This is surely a more specific test than "effective control of [...] operations in the course of which" those acts occurred. The Court seems to get closer, in para. 277, to the first of the two tests in para. 115, though not really reiterating the stricter "directed or enforced".

The coexistence in *Nicaragua* (paras. 115 and 277-278) of three more or less different — but surely not identical — attribution tests is far from being clarified by the presence, in that decision's body, of Judge Ago's Separate Opinion. In that writing the former Special Rapporteur, while reprimanding the majority for introducing, in para. 115, the supplementary attribution test of "effective control" — out of place, in his view, within the framework of the scope of Article 8 (*a*) ([57]) — is even firmer, on the other hand, in bolstering the narrow

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complained of was inflicted by the [US] or by forces controlled by the [US], the Court "is [...] not satisfied that the evidence available demonstrates that the *contras* were *'controlled' by the [US] when committing [the alleged violations*] [...] and it [– again –] has not been able to conclude that the *contras are subject to the [US] to such an extent* that any acts they have committed are imputable to that State" (para. 277 middle) (emphasis added).

([57]) After noting that the ICJ judgment "exhibits some hesitancy, a few at least apparent contradictions and a certain paucity of legal reasoning" (*I.C.J. Reports*, 1986, pp. 189-190), Ago found it "regrettable if the introduction of the idea of 'control' should implant in readers the erroneous idea that the Court is establishing an analogy between the situation here envisaged and instances where it is appropriate to speak of 'indirect responsibility' as opposed to 'direct responsibility' [namely situations] in which one State that [...] exerts control over the actions of another [State] can be held responsible for an [...] act *committed by and imputable to that second State*. The question that arises in such cases — Ago explained — is not that of the *imputability* to a State of the conduct of persons or groups that do not form part of its official apparatus, but that of the transfer to a State of the international responsibility incurred through an act imputable to another State" (*ibid.*, p. 189, footnote 1).

interpretation of "on behalf" with the authority of the 1971 architect of that formula (58).

Enhanced as it is by the explicit reference to the current provisions of the ILC's State responsibility draft, Ago's eloquent peroration in support of a restrictive interpretation of "on behalf" in Article 8(*a*) (in the first part of the judgment's para.115) — is so manifestly and radically in contrast with the 1971 Special Rapporteur's presentation of his draft Article 8 (*a*), as to wipe out, at least for the purposes of the *Nicaragua* case, the broad and flexible scope of the "on behalf" test as described in paras. 190-191 of Ago's Third Report. It was actually the same restrictive interpretation applied by the ICJ in the *Hostages*' first stage.

Yoked as it is, within the Separate Opinion, with the rejection of the alternative test of "effective control" as formulated in the final part of the judgment's para. 115 — the only element in the ICJ's *Nicaragua*

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(58) According to the cited Separate Opinion, "La conformité aux *dispositions du projet de la Commission du droit international* se retrouve aussi dans le fait que la Cour a par contre donné une réponse négative à la suggestion, avancée par le demandeur, de considérer comme des faits imputables aux Etats-Unis d'Amérique les agissements commis par des membres des forces *contras*. Il serait en effet en *contradiction avec les principes régissant la matière* de voir dans des membres de la *contra* des personnes ou des groupes agissant au nom et pour le compte des Etats-Unis d'Amérique. Les *seuls cas* où il serait possible de le faire seraient ceux où certains membres de la *contra* auraient été *spécifiquement chargés* par des autorités des Etats-Unis de *commettre pour le compte de celles-ci une action ou de remplir une tâche ponctuellement déterminée.* Ce n'est que *dans cette hypothèse* que le droit international admet, à titre *tout à fait exceptionnel*, qu'un comportement de personnes ou de groupes ne revêtant pas la qualité d'agents ou d'organes d'un Etat, de membres de son appareil (même pris dans son acception la plus large) puisse être tenu pour un fait de cet Etat. Par conséquent l'arrêt voit juste lorsque, se référant en particulier aux atrocités, aux actes de violence ou de terrorisme et aux agissements inhumains qui, selon le Nicaragua, auraient été commis par des *contras* à l'égard de populations civiles, de leurs membres et de leurs biens, il *exclut que les auteurs de ces agissements puissent être considérés comme ayant été spécifiquement chargés de les commettre par des autorité des Etats-Unis, à moins que, dans quelques cas concrets, la preuve du contraire n'ait été incontestablement apportée.*

Sur ce dernier point je ne puis donc qu'être d'accord en principe avec la constatation faite dans l'arrêt (par. 116) que la Cour ne devait pas s'occuper, dans le cadre du présent procès, des agissements antihumanitaires que les *contras* auraient commis et dans lesquels le Nicaragua voudrait à tort voir des violations de principes du droit international humanitaire attribuables aux Etats-Unis d'Amérique et ne devait prendre en considération que des illicéités éventuelles dont les Etats-Unis se seraient rendus responsables 'en relation avec les activités des *contras*'. Les quelques hésitations ainsi que les quelques impropriétés de langage que parfois l'on peut relever dans la rédaction de certains passages à ce sujet n'enlèvent rien pour l'essentiel au bien-fondé de cette remarque. Je ne puis surtout qu'être d'accord avec la reconnaissance fondamentale de la non-imputabilité aux Etats-Unis d'Amérique des agissements commis par les *contras* au cours de leurs opérations militaires ou paramilitaires au Nicaragua (paras. 115, 116 et 278)" (*I.C.J. Reports*, 1986, pp. 188-189, emphasis added).

reasoning where the Court might have compensated, as it presumably tried to do, the narrowness to which it was reducing Article 8 (*a*)'s "on behalf" — the restrictive reading of Article 8 (*a*) puts virtually the ILC's project's seal under the rejection of the attribution of the *contras*' misdeeds to the United States. The Court's majority, in fact, considered that it was not proved that a United States effective control was exercised on the operations in the course of which those misdeeds had been committed.

As well as other commentators (Antonio Cassese one of them), I find it hard — though not impossible — to believe that United States military or civil officials encouraged — let alone "directed or enforced" — the perpetration of the violations in question: and the Court can — and must — be relied on when it finds no evidence of any such positive conduct on the part of United States organs. Be it as it may with regard to that evidence, as Ago suggests, in individual cases, the lack of such evidence does not exhaust the problem of any possible United States liability for the *contras'* misdeeds against human rights and humanitarian law. The lack of evidence of *positive* United States official conduct in that regard does not exclude the responsibility of the United States: if not on the strength of a properly understood and applied "on behalf", on the strength of the control that United States officials involved in the *contras'* activities or operations *should* have exercised over a military or paramilitary force that their Government was supporting to an extent considerable enough for a proportionally strong "potential for control" to be available to those, among the United States officials, who were involved in the *contras*' activities or operations.

The particular situation of liability based upon control — notably the duty of control — reveals the deformation undergone by the legal problem of responsibility as a consequence of the artificial separation of the attribution issue from the responsibility issue, which is inherent in the normative theory. As well as the State's responsibility for internationally wrongful conduct of members of its armed forces does not require attribution of the individual members' conduct to the State, so the United States liability for *contras*' misdeeds should have been predicated by the ICJ regardless of whether those misdeeds had or not been "directed or enforced" or otherwise authorized or tolerated by United States military or civil officialdom. The normative theory's artificial distinction of an allegedly legal attribution issue from the legal responsibility issue puts the judge in the alternative of criminalising the government by an unjust attribution to the State of individual mis-

deeds, on the one hand, and absolving it from the responsibility which is incumbent upon it for its lack of adequately diligent control, on the other hand.

Much as one must concede to the indeterminacy of customary law (allegedly involved) and to the ICJ's noteworthy inclination to refrain from an adequate effort in the search of the evidence of international custom (59), or, for that matter, simply — forgetting for a moment the normative theory — a thorough study of State practice, it is difficult not to be impressed by both the Court's evocation of three different attribution tests, and the variety of interpretations that have been put forward since 1986 on the ICJ's position about what the latter questionably refers to as the "customary law of attribution" (60).

To begin with, the matter is dealt with unclearly by the Court (61).

The judgment's paras. 115 and 277-278 would seem to have been the product either of different drafters or groups of drafters, or of a single drafter or group of drafters who were not quite clear as to what they meant to say either about the test (or tests) or about the object(s) of the test or tests (62). Be that as it may, Judge Ago's *critique* – despite the more demanding test he had proposed — makes better sense as a matter of logic — and by far more sense than the ensemble of the irreconcilable propositions juxtaposed by the Court's majority within the context of paras. 115 and 277-278. It is natural that a less abstract analysis leads Boyle to contest that the *contras'* manifold dependence — including particularly the distribution of the famous guerrilla war-

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(59) D'AMATO, *Trashing Customary International Law*, *American Journal of Int. Law*, 1987, pp. 101-105.

(60) BRIGGS's authoritative opinion (*The International Court of Justice Lives up to Its Name*, *American Journal of Int. Law*, 1987, p. 78 ff.), that the ICJ, in rendering its *Nicaragua* judgment, "lived up to its name" is fully shared by the present writer except for the part of the decision relating to the non-attribution of the *contras*' misdeeds to the United States. For his part, HIGHET (*Evidence, the Court, and the Nicaragua Case*, *ibid.*, p. 1 ff., at p. 35, text, and footnote 173) seems to justify FALK's opinion that the ICJ "adopts a very restrictive view of the relationship between contra conduct and U.S. accountability" (*The World Court's Achievement*, *ibid.*, p. 106 ff., at p. 110). See also D'Amato, *infra* note 66.

(61) This is remarked, *inter alios*, by Judge M. Shahabuddeen in the Separate Opinion attached by him to the Appeals Chamber's *Tadić* judgment of 15 July 1999, paras. 5 and 8, and also emphasized by the *Tadić* Appeal Chamber, especially in paras. 108, 112, 114 and 116 ff. The keen Judge's statement in para. 8 (that the judgment "is not easy reading") is a charitable understatement. Similar criticism can be read in DOPAGNE's cited article, p. 498, note 23 ("raisonnement [...] pas toujours [...] des plus aisés à interpréter"). The same view is repeatedly expressed by KRESS (*L'organe* de facto, cit., pp. 104-107). One exception seems to be CONDORELLI (*L'imputation*, cit., p. 97 and especially p. 102).

(62) A suspicion strengthened by D'Amato's remarks.

fare manual — was not sufficient for responsibility for their delinquencies to be attributed to the US civil and military staff.

The uncertainties and obscurities in the *Nicaragua* attribution pronouncement (including the discrepancy between the majority's judgment and at least Judge Ago's separate opinion) are abundantly reflected in the differences of interpretation of that pronouncement in the literature and the following judicial decisions.

In the literature (leaving out the few enthusiastic valuations (63)), the most significant reading is Boyle's comment at the AJIL *Symposium* of 1987, where the judgment is criticized for failure to recognize attribution of *contras'* crimes to the US that massively supported that force and actually exercised over them operational control (64). Another critical commentator is Falk (65), whose criticism is correlated to

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(63) CONDORELLI, *L'imputation*, cit., pp. 97-98, where, *inter alia*, he states that the *Nicaragua* pronouncement on attribution was "parfaitement analogue" to the relevant part of the reasoning in *Hostages*.

(64) *Determining U.S. Responsibility for Contra Operations under International Law*, *American Journal of Int. Law*, 1987, p. 86 ff. Boyle speaks of "surrogate covert war against Nicaragua"; explains the ICJ's reticence at p. 87; describes the "chain of command" at p. 88 and repeatedly asserts "knowledge of crimes" by US officials. Boyle's analysis is clear also in the light of the relevant 1949 Fourth Geneva Convention and of the US Army Field Manual itself (p. 88) as opposed to the availability to the *contras* of CIA instructions on guerilla warfare. This in addition to his decisive, articulated assertion that the *contras* were a *longa manus* of the Reagan administration and acted as such in a proxy war against Nicaragua (pp. 87-88) — as such involving the United States Government in the "barbarous outrages upon the civilian population of Nicaragua" (pp. 88 and 90).

This author's view suggests, in good substance, an aggravation of point 9 of the judgment's *dispositif*, where the Court (only Oda opposing) finds the US responsible for delivering to the *contras* what Boyle describes as the "infamous 'psychological operations' manual", in which the author sees an "advocacy of war crimes (i.e. assassinations) to the contras" (p. 89). Here again Boyle finds error in Schwebel's opposite conclusion regarding the "inchoate crime of 'incitement' to commit war crimes" (p. 89). Schwebel's dissenting opinion is also criticized by Boyle for relying "quite extensively on Christopher Dickey's critically acclaimed *With the Contras* to establish several of his factual assertions" while "[s]ome of Dickey's other findings can likewise be usefully employed here for the purpose of establishing the precise degree of responsibility attributable to the Reagan administration for its *contra* proxy war against Nicaragua" (p. 87).

In an accurate reading of the relevant *Nicaragu*a judgement's paragraphs (notably paras. 93-122) one finds even more ground for criticism than in Boyle's itself severe analysis. The Court's underestimation of the US involvement in a fierce civil war sponsored and conducted by the CIA and other US agencies with President Reagan's incitement or approval is particularly evident in paras. 55 ff., 106 ff., 114-115 and 120-122.

(65) FALK, *The World Court's Achievement*, cit., p. 108 ff. As remembered *supra* note 60, according to this author "The Court gives the United States the benefit of the doubt in most gray areas" and "adopts a very restrictive view of the relationship between contra conduct and U.S. accountability" (p. 110).

Boyle's analysis; and both Boyle's and Falk's remarks are enhanced by D'Amato's more general criticism of the quality of the ICJ's handling of customary international law (66). A critical line is also taken by de Hoogh (67). I find surprisingly less critical the evaluation of the

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(66) D' AMATO, *Trashing Customary International Law*, *American Journal of Int. Law*, 1987, p. 101 ff. According to D'Amato, the judgment "reveals the judges of the World Court deciding the content of customary international law on a tabula rasa. Sadly, the judgment reveals that the judges have little idea about what they are doing. [...] If voting for a UN resolution means investing it with *opinio iuris*, then the latter has no independent content; one may simply apply the UN resolution as it is and mislabel it 'customary law'" (pp. 101-102), the ICJ's members "[being] collectively naïve about the nature of custom as a primary source of international law" (p. 105).

D'Amato's critique is also in harmony, in my view, with a factual concept of attribution. The cited author rightly sees customary rules as "resultants of divergent State vectors (acts, restraints)" (p. 102); and in his opinion "the role of *opinio iuris* in this process is simply to identify which acts out of many have legal consequences" (*ibid*.). The Court, D'Amato writes, rules more upon documents (such as UN resolutions, Helsinki Final Act — and, for me, even treaties) than on State practice.

(67) *Articles 4 and 8 of the ILC Articles*, cit., p. 277 ff. The cited author states (citing Boyle) that "on the basis of the facts [available to the Court] it would not at all have been unreasonable to equate [just the same] the *contras* to an organ of the United States", implicitly placing himself in a position close to Falk's view that the ICJ leaned in favour, in the grey areas, of the (non-appearing) United States.

The cited author also refers to EISEMANN, *L'arrêt de la C.I.J. du 27 juin 1986 (fond) dans l'affaire des activités militaires et paramilitaires au Nicaragua et contre celui-ci*, *Annuaire français de droit int.*, 1986, p. 132 ff., at pp. 179-188, who uncritically seems to adhere instead to the Court's requirement of a "total dependence" of the *contras* from the United States. He seems to think that in the "*dépendance*" of the *contras* from the US "la Cour ne peut aboutir qu'à une conclusion nuancée. L'assistance américaine a été essentielle mais le contrôle n'a pas pour autant été total. Il y a donc eu une dépendance partielle à l'égard des autorités des Etats-Unis, dont la Cour ne saurait établir le degré exact" (the author referring to the judgment's para. 111 instead of para. 112). The phrase "assimiler juridiquement parlant la force contra aux forces des Etats-Unis", which appears in the judgment's para. 110 *in fine*, does not conform to the (presumably original) English wording: after stating that "the Court already indicated that it has insufficient evidence to reach a finding on this point [namely, "the extent to which the US made use of the *potential for control* inherent in the *contra*'s dependence"]. It is *a fortiori* unable to determine that the *contra* force may be equated for legal purposes with the forces of the United States. This conclusion, however, does not suffice to resolve the entire question of the responsibility incurred by the United States through its assistance to the contras" (from the judgment's para. 110).

It could not be clearer that the *Nicaragua* judgment required, for attribution, *total dependence* (and control). One wonders, though — anticipating what the same adjudicating body would require in 2007 in order to attribute genocide to the respondent State in that case — in what sense a different, positive conclusion could "in principle" have been reached by the ICJ "giv[ing] rise the legal responsibility of the United States" if it had been proved that that State "had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed" (para. 115 *in fine*, emphasis added). In what sense — one must ask — evidence of *control* of the force's *operations* could *in principle* have led the Court to find United States responsibility? What "principle" could have justified such a (positive) result? On what presumable degree of "control", or "potential for control" could the judges have

Nicaragua attribution pronouncement contained in Thirlway's review of the Court's activity for the relevant year (68). The reading of Thirlway's precise summary and commentaries leads one to wonder whether the combination of "dependence and control" (as analyzed by Thirlway) was really so insufficient to justify attribution to the US of the *contras'* misdeeds on the ground of the "effective control" test hypothetically envisaged by the Court in the conclusive passage of para. 115 (69). J. Verhoeven's and C. Lang's commentaries also express perplexity as concerns the ICJ's non-attribution of the *contras'* delinquencies (70).

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affirmed attribution and consequential responsibility? Be all that as it may, how does "potential for control" on the *contras* operations compare with the "potential for control" on the conduct of *de iure* State officials acting within the scope of their competence or even *ultra vires*?

(68) *The Law and Procedure of the International Court of Justice*, *1960-1989*, *British Yearbook of Int. Law*, 1995, p. 41 ff.

(69) Dependence, Thirlway thinks, would have been "insufficient", according to the ICJ (notwithstanding US support and the Nicaraguan Government's contention that each *contra* offensive followed a legislative funds authorization by the US), as "it does not follow that each provision of funds was made in order to set in motion a *particular offensive*, and that that offensive was planned by the US (ICJ, 1986, p. 60, para. 103)" (THIRLWAY, *The Law and Procedure*, cit., pp. 41-42).

As for control, Thirlway asks whether "it would have been sufficient to show that the US had the power of control, that its agents could have determined the policies and objectives of the contras or would it *not have been necessary to show that it did exercise this power* in a manner inimical to Nicaragua?" The Court went on to say — is Thirlway's answer (at p. 42) — "whether the US Government at any stage devised the strategy and directed the tactics of the *contras* depends on the extent to which the US *made use* of the potential for control inherent in that dependence (ICJ, 1986, p. 62, para. 110)" (emphasis added). But, if the potential for control was commensurate to the degree of dependence, why not attribute to the US the *contras'* misdeeds?

Regarding this part of the Court's reasoning (apparently approved by Thirlway) I wonder whether one — and the ICJ in the first place — should not have assumed that the US control of *contras'* operations *should* have extended as a matter of duty (*due diligence*) to the whole extent and detail necessary to ensure that the various forms of US support would not open (or not close enough) the ... way (a *natural* way for an irregular militia engaged in a civil war under US sponsorship) to the commission of the violations complained of. A support due to which a few hundred people bands had become an organized force of 12,000, had presumably turned the *contras*, in practice, into a *longa manus* of the United States, thus justifying Boyle's opinion (also on the strength of the distribution of the guerrilla warfare manual) that the crimes were attributable to the United States: an opinion apparently shared, to some extent, by de Hoogh.

(70) The former (*Le droit, le juge et la violence*, *Revue générale de droit int. public*, 1987, pp. 1230-1231) notes lack of clarity of "fondement exact" in the Court's negative choice "nonobstant le contrôle généralisé", supposedly because of a lack of proof of a "contrôle 'spécial' sur les *opérations* au cours desquelles le droit des gens fut violé [with regard to human rights and humanitarian law]" (p. 1231 (emphasis added)). A similar view is expressed by LANG (*L'affaire Nicaragua/Etats-Unis devant la Cour internationale de justice*, Paris, 1990, pp. 218-223). Lang, however, seems more decidedly critical and

10. The narrow interpretation of Article 8 (*a*)'s "on behalf" is in contrast with a number of pre- or post-1986 judicial decisions, the most elaborate of which is the ICTY *Tadić* Appeals judgment of 15 July 1999, where broader attribution tests are envisaged than the instructions, express instructions or obscure (Nicaragua's) "effective control" (of "operations" or "activities") (71). While confirming — from the Trial Chamber to the Appeals Chamber's stage — a variety of interpretations of the *Nicaragua* attribution pronouncement not less significant than the variety of the above considered literature's interpretations, that case's Appeals judgment contains a sharp *critique* of the ICJ's 1986 attribution pronouncement. According to that decision, that attributes the Bosnian Serb Army conduct to the Federal Republic of Yugoslavia (paras. 146 ff.), the *Nicaragua* attribution pronouncement is consistent neither with the "logic of the law of State responsibility" (paras. 116-123) nor with "judicial, and State practice" (paras. 124-145) (72). In the case of military or paramilitary organized groups the Appeals Chamber contends, taking decisive issue with *Nicaragua*, that the test to be applied was that of the State's "overall control" or "effective overall control" by the State over the group as a whole, notably over the group's leaders, commanders or authorities, as opposed to the "'detailed' control over the [group's] specific 'policies or actions', as was the case of the *Nicaragua*'s 'effective control' of [...] *contras* operations [or] 'activities'". Regarding the "logic of the law" of responsibility, the Appeals Chamber believes that the principles of law "are not based on rigid and uniform criteria". One hypothesis would be that of internationally questionable private individuals' acts authorized or *ex-post* endorsed by the State, or carried out in excess of a lawful function or service entrusted by the State (73). Another hypothesis is that of internationally questionable conduct by "individuals making up an organized and hierarchically structured group, such as a military

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rightly notes, in my view, that the ICJ "semble ici en retrait sur l'arrêt" [*Hostages*] (p. 223). Both commentators share the apparently general understanding of "specificity" as pertaining to the "*opérations*" rather than to "*violations*".

(71) ICTY, *Prosecutor v. Duško Tadić*, Judgement of 15 July 1999, case n. IT-94-1-A.

(72) With regard to the latter the Appeals Chamber refers, in addition to the above-mentioned *Youmans* (para. 122), *Yeager* and *Loizidou*, to other cases such as *Jorgić* (para. 129), *Hostages* (para. 133), the UCLA's conduct's attribution in *Nicaragua* (para. 134), *Joseph Kramer* (para. 142), *Menten* (para. 143) etc. (see para. 144 and note 175 thereunder).

(73) Attribution being effected in the latter case — according to the Chamber — on the strength of the same principle that a State is responsible for *ultra vires* acts of (*de iure*) State officials.

unit or, in case of war or civil strife, armed bands or irregulars or rebels" (para. 120, emphasis in the original).

To the important elaboration and consolidation of the overall control test, the *Tadić* Appeals Chamber judgment adds a number of features — positive or negative according to the case — that call for some *mises au point* from both the specific point of view of the concept and applications of the overall control test, and the attribution theory.

Firstly, on the negative side, the Appeals Chamber shares uncritically the universal (though unproven) normative concept of attribution. It adds even some fuel to that theory by the assertion that attribution is a matter of customary law on the way to codification by the evoked ILC more or less relevant "norms". On the other hand — what I consider the positive side — the judgment's adherence to the normative theory is attenuated, at least in the eyes of an opponent to that concept, by usefully inconsistent admissions that "[t]he principles of international law concerning [...] attribution [...] of acts performed by private individuals are not based on rigid and uniform criteria" (74) and that the Appeals Chamber "fail[ed] to see why in each and every circumstance international law should require a high threshold for the test of control. Rather, various situations may be distinguished" (75).

Conversely — back to the negative side — the Appeals Chamber's perfect adherence to the normative concept is otherwise stressed by the unnecessarily lengthy discussion of the Prosecutor's absurd (though far from isolated) idea that attribution for the purposes of individual criminal liability and humanitarian law could be subject to any kind of a (supposedly juridical or normative) special régime distinct from the (alleged) law of attribution for the purposes of State responsibility. If such a proposition was not simply dismissed by the Chamber on its face — as rightly it ultimately was in the judgment's para. 98, not, *hélas*, without an objectionable insistence on the idea that the matter is

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(74) Para. 117 of the judgment, at p. 47.

(75) Para. 117 *in fine*, at p. 48. As noted by DOPAGNE, *La responsabilité*, cit., p. 504, the Appeals Chamber did not confine its task to "appliquer la théorie de l'organe de fait; à certains égards, elle paraît plutôt s'être laissée emporter par la tentation de *faire* le droit, ce qui n'était assurément pas son office" (emphasis in the original). The author refers particularly to the distinction between "les individus (ou les groupes non organisés) et les 'groupes organisés' [...] [distinction] sans véritable précédent dans la pratique internationale! Les motifs qui l'étayent sont au demeurant quelque peu mystérieux...". The cited author's comment is obviously conceived within the framework of an uncritical adherence to the questionable normative concept of attribution. This is manifest from the rest of the cited author's comment (pp. 504-505).

governed by "general international law" — it was because of the preconceived normative theory (76).

Back to *Nicaragua*, it is not less disturbing that the *Tadić* Appeals Chamber's justified impatience with the ICJ's superficial attribution pronouncement of 1986 (in the part concerning the *contras*) led the Appeals Chamber's members to ignore (or misread) the last lines of para. 115 of the *Nicaragua* judgment. Had they read those lines more carefully, it would have been impossible for lawyers of their standing to maintain that the pronouncement in question applied a *single test* (77). Indeed, the tests have not just different names (direction or enforcement, on the one hand, effective control on the other). They also had, as already shown, different test objects altogether: "perpetration" of the violations, on the one hand, "operation in the course of which the [...] violations were committed", on the other hand (78).

The Appeals Chamber's meritorious development of the overall control test calls for some reservation regarding the extent of validity of the distinction between the hypothesis of the single person's or persons' conduct, on the one hand, and the more or less hierarchically organized group conduct's hypothesis, on the other hand. Much as it is true that in single person's or persons' conduct cases the instructions or

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(76) Any "special" rules of humanitarian law of the kind indicated by the Prosecutor — including the surely customary norm envisaging a State's responsibility for any acts of its armed forces' members — are just primary rules.

(77) The Appeals Chamber contested the Prosecution's and the Trial Chamber President McDonald's reading of the *Nicaragua* attribution pronouncement, that (while noting that the UCLA's conduct was attributed on the basis of an "agency" test) the *contras'* misdeeds were not attributable, despite a general dependency/control relationship, for not meeting an effective control test hinging on the issuance of specific directions or instructions concerning the *contras'* misdeeds. The test applied had been, in other words, an "effective control" involving "specific instructions" (Appeals judgment, para. 106, p. 42), or "effective control" of specific operations. The Appeals Chamber did "not subscribe to that interpretation: "In paragraph 115 of [*Nicaragua*], where 'effective control' is mentioned, it is unclear whether the Court is propounding 'effective control' as an alternative test to that of 'dependence and control' set out earlier in paragraph 109 or is instead *spelling out the requirements of the same test*. The Appeals Chamber believes that the latter is the correct interpretation. In *Nicaragua* [in addition to the 'agency' test for the formal status of State officials, applied by the Court for the UCLA's] the Court propounded *only the 'effective control' test*. This conclusion is supported by the *evidently stringent application of the 'effective control' test* which the Court used in finding that [the *contras*' misdeeds] were not imputable to the United States". (emphasis added)

(78) The Appeals Chamber's judges were presumably not aware of Professor D'Amato's severe assertion (although he referred generally to the International Court's (ICJ) approach to international customary law) (see *supra*, note 66) that "the judgment reveals that ICJ judges ha[d] little idea about what they [were] doing" (D'Amato, *Trashing Customary International Law*, cit., p. 102).

specific instructions test proves to be an indispensable condition of attribution, it cannot be excluded that even in hypotheses of isolated individuals' conduct, overall control could well suffice for the purposes of such conduct's attribution to a State. As well as a more or less organized group, also isolated individuals or unorganized groups may happen to be charged by a State to perform a lawful function, service or mission, during the performance of which internationally questionable actions occur. The State's overall control would be in such hypotheses a sufficient test for attribution as well as a matter of the State's due diligence. Instructions or specific instructions should not be required.

It could probably be correct to conclude, with regard to *Tadić*, that it brings back the clock to the 1971 Article 8 (*a*)'s presentation, namely to Ago's *prima maniera* understanding of that Article's "on behalf".

11. Important cases — all except one subsequent to *Nicaragua* — are *William L. Pereira* (1984), *Kenneth P. Yeager* (1987), *Arthur Young and Co.* (1987), *Daley* (1988), and *Schott* (1990), decided by the Iran-United States Claims Tribunal (IUSCT); *Loizidou v. Turkey*, decided by the ECHR in 1996; *Jorgić*, decided by the Oberlandesgericht of Düsseldorf in 1997; as well as the already analyzed *Tadić* (1997-1999), decided by the ICTY. These cases are all more or less decidedly departing from attribution standards such as "instructions", "impositions" or "effective control" applied by the ICJ in *Nicaragua*. The clearest departures from Nicaragua are *Kenneth P. Yeager*, *Loizidou* and the *Tadić* Appeal judgment.

A very important case is, of course, the well-known *Loizidou*, concerning violations of the European Human Rights Convention occurred in the territory of the Turkish Republic of Northern Cyprus (TRNC). In *Loizidou*, the European Court on Human Rights dealt with the complaint of the owner of a property situated in northern Cyprus for denial of access to the property by Turkish authorities (79). Rejecting the denial of responsibility by Turkey, based on the argument that the area where the property was situated was under the jurisdiction of

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(79) *Loizidou v. Turkey*, ECHR, Judgment of December 18, 1996, with Concurring Separate Opinions by Judges Wildhaber and Ryssdal (p. 33 ff.) and Dissenting Opinion by Judges Bernhardt and Lopez Rocha (pp. 24-25), the latter being quite substantial. See also the preliminary judgment on jurisdiction of March 23, 1995; and the Dissenting Opinions of Judges Baka, Jambrek, Pettiti and Gölcüklü (pp. 26-41). On this case see VITUCCI, *Atti della Repubblica turca di Cipro del Nord e responsabilità della Turchia: il caso Loizidou*, *Rivista di diritto int.*, 1998, p. 1065 ff.

the TRNC, the Court decided that, because the local authorities were under the "effective overall control" of Turkey, the latter was responsible. The Court specified *inter alia* that, the area being thus under Turkish jurisdiction for the purposes of the European Convention, it was not necessary to ascertain whether Turkey had exercised "detailed control over the specific policies and actions of the TRNC" (80). In addition to the concept of "jurisdiction" — Turkey's territorial jurisdiction considered by the Court to extend to Northern Cyprus (81) — the decision — being far from exempt, however, from separate and dissenting opinions — refers explicitly not only to "overall control" but also to "effective overall control" (82).

Upon overall control are equally founded the attribution pronouncements issued by the Iran-US Claims Tribunal in 1987 and 1988. In *Kenneth P. Yeager*, concerning wrongful acts of Iranian Revolutionary Guards against American nationals in 1979, the Tribunal found those acts to be attributable to the Iranian State because the Revolutionary Komitehs in question "served as local security forces in the immediate aftermath of the revolution [...], made arrests, confiscated property, and took people to prison" exercising "governmental authority" with the "toleration" of the Government and thus on behalf of the Iranian State (83). The Tribunal implicitly applied the overall control test to the actions of the militias when it found "sufficient evidence in the record to establish a presumption that revolutionary 'Komitehs' or 'Guards' after 11 February 1979 were acting in fact on behalf of the new government" (84). In the *Daley* case, attribution was based on the fact that the confiscation complained of had been effected in a hotel by a group of armed "revolutionary guards" that controlled the hotel area. No governmental instructions having emerged from the record, the applied standard seems actually to have been the State's overall control over the guards (85). In the other three cases, namely *William L. Pereira*, *Arthur Young and Co.* and *Schott*, while denying Iran's responsibility for lack of causal link between the revolutionary guards' actions and

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(80) In the Court's language, "[i]t is obvious from the large number of troops engaged in active duties in northern Cyprus [...] that [the Turkish Army] exercised effective overall control over that part of the island" (p. 18, para. 56, of the judgment).

(81) Cited Judgment, esp. p. 17 ff., paras. 52, 61 and 77-80.

(82) *Supra*, note 80.

(83) *Kenneth P. Yeager v. Islamic Republic of Iran*, in *Iran-United States Claims Tribunal Reports* (IUSCTR), vol. 17, 1987, p. 92.

(84) *Ibid.*, pp. 103-104.

(85) *Leonard and Mavis Daley v. Islamic Republic of Iran*, in IUSCTR, vol. 18, 1988, pp. 237-238.

the alleged internationally wrongful act, the Tribunal held that otherwise responsibility might have arisen for acts of "armed men wearing patches on their pockets identifying them as members of the revolutionary guards" (86). This hypothesis confirms the IUSCT's tendency not to require evidence of specific instructions and implicitly to approximate an overall control standard.

In the *Jorgić* case, the Bosnian Serb Army — accused of crimes in Bosnia-Herzegovina — was considered by the Oberlandesgericht of Düsseldorf to be subject to something pretty similar to an overall control by the Federal Republic of Yugoslavia, a sufficient basis for the conflict involving that military force to be an international conflict for the purposes of the relevant Convention (87).

As aforementioned, the overall control test — for organized military or assimilable groups — was also confirmed by the ICTY in the 15 July 1999 judgment on the *Tadić* case. The Appeals Chamber had to review the Trial Chamber's negative decision on the international nature of a certain stage of the conflict between Bosnia-Herzegovina (BH) and the Federal Republic of Yugoslavia (FRY) for the purposes of Article 2 of the Tribunal's Statute, such question turning on the issue whether "Bosnian Serb forces could be considered as *de iure* or *de facto* organs of a foreign Power, namely of the FRY". Rejecting as too high the "effective control" test applied by the ICJ in *Nicaragua* — effective control extending, in the Chamber's view, to the issuance of specific instructions (concerning the various activities of the individuals in question) — the Appeals Chamber, quoting also *Kenneth P. Yaeger, Loizidou* and others among the above-mentioned cases, decided that since the Bosnian Serb forces in question were under the "overall control" of the FRY's army, they were to be considered as organs of the FRY and the conflict in which they were involved consequently qualified as an international conflict. The Appeals Chamber took the occasion further to clarify its position by taking the distance from the "effective control" test (as well as any specific order, imposition or authorization) criticizing particularly the ICJ's attribution pronouncements in *Hostages* and *Nicaragua*.

Coming to the more recent decisions, it seems that only the ICJ refrained, in *Genocide* as well as *Nicaragua*, from applying an overall control test.

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(86) *Arthur Young and Company v. Islamic Republic of Iran,* award no. 338-484-1, in IUSCTR, vol. 17, 1987, p. 258, par. 53.

(87) Judgement of 26 September 1997, 2 StE 8/96.

Cases where an overall control test, however defined, was resorted to in the period in question were *Drozd* and *Janousek v. France and Spain*, 1992, where the claim against those States, allegedly responsible for a breach of the European Human Rights Convention by Andorran Courts, was rejected (by a majority of 12 votes to 11) because the acting Courts of Andorra were seen not to be under the "effective control" of France, Spain or both: where the effective control in question was apparently not recognized as an overall control, because Andorran Courts or Andorra were not under the "jurisdiction" of France, Spain or both (88).

In the *Stocké* case, a question of attribution could have emerged from an alleged kidnapping and imprisonment of a German national in French territory with a view to have him tried in Germany: such action having been taken in breach, by Germany, of Articles 5 and 6 of the European Human Rights Convention. Although the applicant alleged involvement of German agents, the Court rejected the claim without dealing conclusively with the problem of attribution of the action to Germany (89).

Following the *Al Fatah* Rome and Vienna terrorist attacks of 1985/1986 the question arose of their attribution to Libya. The issue was informally dealt with, affirmatively, in the US President's News Conference of January 7, 1986 and in the same date's News Conference by US Undersecretary of State Whitehead (90). One can assume that, had the US allegations been verified, the attribution to Libya of *Al-Fatah* actions could only be predicated on the ground of an overall control test.

Another instance straddling the ICTY's treatment of the *Tadić* case is *Al-Khiam*, where the violation of fundamental human rights was attributed to the State of Israel by a decision of the UN Human Rights Commission's Working Group on the ground of the overall control exercised by Israel's Army (IDF) on the Southern Lebanese Army (SLA). This conclusion was reached on the basis of the financial, logistical, and other assistance and support received by SLA from IDF, as well as the coordination between the two armed forces (91).

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(88) ECHR, Plenary Court, Judgment of 26 June 1992.

(89) *Stocké v. Germany*, ECHR, Judgment of 19 March 1991.

(90) *Int. Legal Materials*, 1986, pp. 175 and 215 respectively.

(91) Doc. E/CN.4/2000/4 of December 28, 2000, containing the *Report of Working Group on Arbitrary Detention*, a document reflecting the Working Group's activities roughly between 1997 and 1999. See the said *Report*, especially pp. 9-14. In reaching its opinion the Group referred (p. 10) to the 1907 Hague Convention and annexed Regulations, the relevant provisions of the Fourth Geneva Convention on the Protection of Civilians in Time of War of 12 August 1949, the ICJ's *Nicaragua* judgment, and the *Tadić* Appeal judgment.

Although it does not involve issues of attribution, it is also worth mentioning the *Banković* case brought before the European Human Rights Court by victims of the NATO 1999 bombings of Belgrade's Radio Television Serbia building, against a number of NATO States (92). The case is of interest in that the Court discussed the applicants' argument that a "specific application [be made] of the 'effective control' criteria developed in the northern Cyprus cases", and that "the positive obligation under Article 1 [of the European Human Rights Convention] extend[ed] to securing the Convention rights in a manner proportionate to the level of control exercised in any given extra-territorial situation", namely that the extraterritorial situation in which the bombing had taken place was covered by the concept of "jurisdiction" under Article 1 of the Convention.

Following particularly the *Loizidou* precedent is the ECHR's 10 May 2001 judgment in the *Cyprus v. Turkey* case, where again the test evoked was not just "overall control" (p. 21), but also "effective control" (p. 33), "effective overall control" and "detailed control" (p. 20) (all picked up by quoting, at p. 20, the *Loizidou* judgment's para. 56), as well as the test of Turkey's "jurisdiction", within which the behaviours complained of in the case fell within the meaning of Article 1 of the Convention (93). The actions complained of by Cyprus were not only violations of the rights of Greek-Cypriot missing persons and their relatives by the TRNC's authorities, but also violations of the rights of Greek-Cypriots or Turkish-Cypriots by "acts of private parties in Northern Cyprus". On the evidence of the Turkish overall and even "detailed" control of the TRNC and the extension of Turkish jurisdiction over the area, the Court recognized the responsibility of Turkey for violation of various provisions of the European Convention (94). It found, on the other hand, that no violation of Article 1 of Protocol No. 1 had been established by virtue of an alleged local authorities' practice of failing to protect the property of Greek-Cypriots living in northern Cyprus against interferences by private persons (95).

While the cases such as *Loizidou*, *Banković* and *Cyprus v. Turkey* — decidedly based upon the "overall" or "overall effective control" — straddle the 1999 *Tadić* Appeal judgment, the decisions following the

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(92) ECHR, Grand Chamber, *Vlastimir and Borka Banković and Others v. Belgium and other NATO States*, Decision of 19 December 2001 as to the admissibility of application No. 52207/99.

(93) *Case of Cyprus v. Turkey*, ECHR, Judgment of 19 May 2001.

(94) *Ibid.*, pp. 93-100.

(95) *Ibid.*, para. 272

latter appear to consolidate, also by virtue of the *Tadić* decision's confirmation, the "overall control" standard implicitly applied even earlier, in the view of the present writer, especially in *Zafiro*, *Youmans* and *Stephens* of the pre-Nineteenseventies era. The ICTY cases — *Blaškić* (Trial Chamber, March 3, 2000), *Alexovski* (Appeals Chamber, March 24, 2000) and *Kordić* (Trial Chamber, February 26, 2001) — are all based upon the overall control test (96), and they all elaborate, taking due account of the circumstances of each, the relevant overall control *indicia* (97). Overall control — as evidenced by the economic, logistic and military support of East Timor pro-Indonesian militias by the Indonesian Army — is in substance the standard applied by the three Rapporteurs of the joint UN mission to East Timor in their report to the Secretary-General embodied in the latter's Note of 10 December 1999 transmitted to General Assembly members (98).

A negative case from the viewpoint of attribution is *Gentilhomme and Others v. France*, where the ECHR found that the claim that France was responsible for the refusal of French authorities to "accueillir" the Gentilhomme children in a French school in Algeria could not be upheld for lack of French jurisdiction on the matter. According to the Court (that recalled the equally unsuccessful *Banković and Others v.*

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(96) *Prosecutor v. Thomir Blaškić,* ICTY Trial Chamber judgment of 3 March 2000, case n. IT-95-14-T; *Prosecutor v. Zlatko Alexovski*, Appeals Chamber judgment of 24 March 2000, case n. IT-95-14/1-T; *Prosecutor v. Dario Kordić and Marion Čerkez*, Trial Chamber judgment of 26 February 2001, case n. IT-95-14/2-T.

(97) Developments on "overall control" *indicia* are set forth with particular care (not without references to *Tadić*) in the *Kordić* case, cit., pp. 32-33 (paras. 114 and 115) as further developed at p. 33 ff. (paras. 116-145). Among the considered *indicia* an important place is reserved to the Croatian President's Greater Croatia "dream".

(98) UN doc. A/54/660. The three Rapporteurs had denounced the "close cooperation between militia elements and TNI" soldiers and policemen in the violence against persons and property, including collusion and close links between the militia, TNI and the police testified by rape survivors. As stated in para. 62, "on many occasions no distinction could be made between members of the militia and members of TNI, as often they were one and the same person in different uniforms [...]. Further testimony implicates TNI officers as perpetrators of sexual violence". The Rapporteurs' conclusion (on extra-judicial summary or arbitrary executions, on the question of torture and on violence against women, its causes and consequences) was that "[e]ven applying the strict standards of the International Court of Justice to establish State responsibility for the acts of armed groups in a context of external intervention (dependency of the group on the State) and the exercise of effective control of the group by the State, a standard which cannot reasonably be applied to a State's own acts and omissions of governance of its own people, there is already evidence that TNI was sufficiently involved in the operational activities of the militia, which for the most part were the direct perpetrators of the crimes, to incur the responsibility of the Government of Indonesia. What still remains to be determined is how much of TNI and to what level in the hierarchy there was either active involvement or, at least, culpable toleration of the activities" (para. 72 of the cited document).

Belgium and 16 other States), "jurisdiction" in the sense and for the purposes of Article 1 of the European Human Rights Convention had to be understood in a sense "principalement" or "essentiellement" territoria[l]" (as in *Banković*, paras. 59 and 61) (99).

Substantially on overall control is based *Ilaşcu and Others v. Moldova and Russia*, where there was a question of attribution to Russia of the conduct of Transniestria. Considering that Transniestria (MRT), "set up in 1991-92 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation", the applicants' fate fell under "a continuous and uninterrupted link of responsibility on the part of the Russian Federation [...:] the applicants therefore come within the 'jurisdiction' of the Russian Federation for the purposes of Article 1 of the European Human Rights Convention" (100).

Coard et al. v. United States, submitted to the Inter-American Commission on Human Rights, concerned complaints by a number of people first arrested, detained and interrogated by US military forces in Grenada, while the latter were suppressing further armed resistance to their military operations (25 October-2 November 1983) intended to "restore essential civic order throughout the island of Grenada", and after the fighting ceased (on about 27 October), turned over to the Caribbean Peacekeeping Force (CPF). The facts being unquestionably attributed to US military in Grenada, the only interesting point regarding attribution could be simply "jurisdiction" for the purposes of the American Human Rights Declaration, namely whether the United States was obliged by that Declaration to comply with its rules on arrest, detention, treatment etc., and ensure "that such persons shall be heard with the least possible delay by a competent judicial authority with the power to order release should detention be deemed unlawful or arbitrary" (101).

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(99) ECHR, *Affaire Gentilhomme et autres* c. *France*, Judgment of 14 May 2002, paras. 20 ff.

(100) ECHR, *Ilaşcu and Others v. Moldova and Russia*, Judgment of 8 July 2004, paras. 392-394.

(101) See Commission's Conclusions and Recommendations in the case, Inter-American Commission on Human Rights, Report No. 109/99, case No. 10-951, pp. 13-14 (29 September 1999). The question of "jurisdiction" and territoriality thereof seemed also to be raised in the UN Human Rights Committee in Communication No. 52/1979: *Uruguay* 29/07/81 (CCPRC/13/D/52/1979), UN Doc. CCPR/C/13/

A further overall control case is *Issa and Others v. Turkey*, decided by the European Court of Human Rights in 2004 (102), concerning the complaints by a number of shepherds' wives whose husbands had allegedly been killed while under the control and authority of Turkish armed forces in northern Iraq ("arrest, detention, ill-treatment and subsequent killing of [the shepherds] in the course of a military operation conducted by the Turkish army in northern Iraq in April 1995"). According to the Turkish Government, while confirming that a Turkish military operation took place in northern Iraq between 19 March 1995 and 16 April 1995, "[t]he records of the armed forces do not show the presence of any Turkish soldiers in the area indicated by the applicants" (103). In the light of its inadmissibility decision in *Banković and Others v. Belgium (and other States)* of 12 December 2001 — the Turkish Government contended —, the Court had departed from its previous case-law on the scope of interpretation of Article 1 of the European Convention. Since the issue of jurisdiction in the applicants' case had been left unresolved in the admissibility decision, which pre-dated the *Banković* decision, "the Court should address itself in the first place to the compatibility *ratione loci* of the application" (104). Although the applicants claimed that the Turkish Government was precluded from raising the issue of jurisdiction at that stage (105), the Court deemed that the jurisdictional issue was inextricably linked to the facts underlying the allegation and was as such "implicitly reserved to the merits stage" (106).

In the debate on that issue, the Turkish Government maintained that "the mere presence of Turkish armed forces for a limited time and for a limited purpose in northern Iraq was not synonymous with 'jurisdiction' [...] Turkey did not exercise effective control of any part of Iraq and it had to be concluded that Turkey could not be held responsible for the acts imputed to it in the [...] application" (107). The applicants claimed that their jurisdictional position remained unaffected by the *Banković* decision, that the atrocity's victims were "within

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D/52/1979 of 29 July 1981. A similar issue of jurisdiction seems to have arisen in the Communication No. 56/1979 submitted by *Lilian Celiberti de Casariego* on 17 July 1979, Alleged victim: the author. State party: Uruguay, Doc. CCPR/C/13/D/56/1979 of 29 July 1981. In both cases individual views were added by Professor Christian Tomuschat.

(102) ECHR, Judgment of 16 November 2004 (application n. 31821/96).
(103) Para. 25 of the Judgment.
(104) Para. 52 of the Judgment.
(105) Para. 55 of the Judgment.
(106) *Ibid*.
(107) Para. 58 of the Judgment.

the jurisdiction of the respondent State at the material time" and that "Turkey's ground operations in northern Iraq were sufficient to constitute 'effective overall control' [within the meaning of *Loizidou*]" of the relevant area (108).

Following a discussion of the concept of "jurisdiction" (citing *Ilaşcu, Gentilhomme, Banković* and *Assanidzé v. Georgia*), the Court admitted that a State's responsibility may be engaged where, as a consequence of military action — lawful or unlawful — that State exercises "effective control" of an area situated outside its national territory, or "detailed control" over the policies and actions of authorities in that area, adding also the possibility of extending the concept to the case of "persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating — whether lawfully or unlawfully — in the latter State" (109).

In light of the above principles, the Court examined the facts of the case in order to ascertain whether the applicants were under the "authority and/or effective control and therefore within the jurisdiction" of Turkey (para. 72). It considered Turkey's operations in northern Iraq (para. 73), with regard to the possibility that as a consequence Turkey "could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory or specific area" (which would have placed the applicants under the jurisdiction of Turkey and not of Iraq (para. 74)). However, "notwithstanding the large number of troops involved in the aforementioned military operations, it does not appear that Turkey exercised effective overall control of the entire area of northern Iraq" (para. 75), notably that Turkey's troops had conducted operations in the area where the killings took place (para. 76). On the basis of the materials in its possession, the Court considered that "it ha[d] not been established [...] that the Turkish armed forces conducted operations in the area in question, and, more precisely, in the hills above the village of Azadi where [...] the victims were at that time", and concluded that it was

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(108) Paras. 62-63 of the Judgement.

(109) See paras. 66-71 of the Judgement. The Court citing the cases of *M. v. Denmark*, Commission decision of 14 October 1992, DR, 73, p. 193; *Illich Sanchez Ramirez v. France*, application No. 28780/95, Commission decision 24 June 1996, DR, 86, p. 155; *Coard et al. v. the United State*s, Inter-American Commission for Human Rights decision of 29 September 1999, Report No. 109/99, case No. 10.951, paras. 37, 39, 41 and 43, and the Human Rights Committee views in cases *Lopez Burgos v. Uruguay* and *Celiberti, de Casariego v. Uruguay*, Nos. 52/1979 and 56/1979, at paras. 12.3 and 10.3 respectively.

"not satisfied that the applicants' relatives were within the 'jurisdiction' of the respondent State for the purposes of Article 1 of the Convention" (para. 82), thus rejecting the claim.

The 2005 Report of the International Commission of Inquiry on *Darfur* to the Secretary General ([110]), applies, in para. 123, as ground for attribution to the central Government of a certain conduct, the notion of control, i.e. the overall control set out in 1999 in *Tadić*. The issue relates, as shown in the Report's introduction, to the actions of militias controlled by the Sudanese Government, and to the identification of perpetrators. The militiamen involved were identified by the Commission as "acting as *de facto* officials of the Government of Sudan" ([111]); and the Commission strongly recommended that the Security Council immediately refer the situation of Darfur to the International Criminal Court (ICC) pursuant to article 13 (*b*) of the ICC Statute, the situation "constitut[ing] a threat to international peace and security". The Commission reported that "[t]he Sudanese justice system is unable to address the situation in Darfur", and the measures taken "so far by the Government to address the crisis have been both grossly inadequate and ineffective [...] which has contributed to the climate of almost total impunity for human rights violations in Darfur". The Commission urges the Security Council to act not only against the perpetrators but also on behalf of the victims, and recommends a number of serious measures to be taken by the Government of Sudan relating to justice, access by the International Red Cross Committee and UN human rights monitors, ensuring the protection of victims including refugees and internal displaced persons (IDPs), fully cooperating with the UN and the African Union. The Commission finally recommended measures to be taken by other bodies "to help break the cycle of impunity", such as exercise of universal jurisdiction by States and continuation of vigilance on the human rights situation in Darfur ([112]).

([110]) Report of 25 January 2005, adopted pursuant to Security Council resolution 1564 (2004), annexed to Secretary-General's letter of 31 January 2005, UN doc. 5/2005/60.

([111]) *Ibid*., p. 39, para. 123; see also pp. 36-37, paras. 111-116.

([112]) *Ibid*., pp. 4-6. The pages quoted are from the Executive Summary of the Report. Para. 112 of the Report describes the PDF dependence from the Sudanese Army ("under the direct leadership of an army officer"), coordination of raids between government armed forces and militiamen ("described as Janjaweed"); para. 113 relates to salaries from the State to militia men through the army, and tacit agreement of the State authorities to loot any property, all the militias operating "with almost complete immunity for attacks on villages and human rights violations, the Commission having substantial testimony [...] that police officers in one locality received orders not to

Despite the Government's attempts to distinguish between "Janjaweed", "rebels", "Popular Defence Forces (PDF)" and "tribal militias" (para. 118) "some official statements confirm[ed] the relationship between the Government and the militias", and the Commission did not obtain documentation from the Government relating to their statements concerning the Janjaweed and other actors, and despite the Government's expression of regrets for the Janjaweed actions, "the various militias' attacks on villages have continued throughout 2004, with continued Government support" (paras. 119-120). The question of legal responsibility for acts committed by the Janjaweed is dealt with in paras. 121-126, esp. 123, where it is stated that "w[hen] militias attack jointly with the armed forces, it can be held that they act under the effective control of the Government, consistently with the notion of control set out in 1999 in *Tadić* (Appeal) at paras. 98-145. Thus they are acting as *de facto* State officials [...] of Sudan. It follows that, if it may be proved that all the requisite elements of effective control were fulfilled in each individual case, responsibility for their crimes is incurred not only by the individual perpetrators but also by the relevant officials of the army for ordering or planning those crimes" (113).

12. In the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* judgment of 19 December 2005, after finding "credible evidence to conclude that the Uganda Peoples' Defence Forces (UPDF) troops had committed acts of killing, torture and other forms of inhuman treatment of the civilian population" in the Democratic Republic of the Congo (114) and that the conduct of the UPDF as a whole was attributable to Uganda, it being the conduct of State organs, the International Court of Justice stated that "according to a well-established rule of international law, which is of customary character, the conduct of any organ of a State must be regarded as an act of that State [...]. In the Court's view, by virtue of the military status and function of Ugandan soldiers in the DRC, their conduct is attrib-

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register or investigate complaints made by victims against Janjaweed" (para. 113). Para. 115 concerns confidential documents made available to the Commission "further support[ing] the above conclusions on links between the militias and the Government, including 'the recruitment of the militias'" (para. 115). Although the Commission did not have exact figures of the numbers of active Janjaweed, substantial data indicated that their size was considerable, and that a Janjaweed camp was even visited by an army Brigadier and two military helicopters "roughly once a month [brought] additional weapons and ammunition" (para. 116).

(113) *Ibid*., p. 39.

(114) *I.C.J. Reports*, 2005, p. 168 ff., para. 211 of the judgment.

utable to Uganda. The contention that the persons concerned did not act in the capacity of persons exercising governmental authority in the particular circumstances, is therefore without merit" (115). The Court added that "[i]t is furthermore irrelevant for the attribution of their conduct to Uganda whether the UPDF personnel acted contrary to the instructions given or exceeded their authority, the latter point conforming to a well-established rule of customary nature, as reflected in Article 3 of the Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907 as well as in Article 91 of Protocol I additional to the Geneva Conventions of 1949, a party to an armed conflict shall be responsible for all acts of persons forming part of its armed forces" (116).

It is difficult not to be startled by the waste of words that the most authoritative international judicial body deemed to be necessary to state that Uganda was liable for acts of members of its armed forces: a wantonly circular language apparently imposed by the Court's uncritical adherence to the normative theory of attribution. One wonders how come the Court avoided a reference to Article 4 of the ILC's Articles.

As concerns the acts of a paramilitary group called Mouvement pour la libération du Congo (MLC), that fought against the Democratic Republic of the Congo and to whom Uganda gave training and military support, the Court excluded the responsibility of Uganda as it "had not received probative evidence that Uganda controlled, or could control, the manner in which Mr. Bemba [leader of the MLC] put such assistance to use. In the view of the Court, the conduct of the MLC was not that of an 'organ' of Uganda (Article 4, International Law Commission Draft Articles on Responsibility of States for internationally wrongful acts, 2001), nor that of an entity exercising elements of governmental authority on its behalf (Article 5). The Court has considered whether the MLC's conduct was 'on the instructions of, or under the direction or control of' Uganda (Article 8) and finds that there is no probative evidence to which it has been persuaded that this was the case. Accordingly no issue arises in the present case as to whether the requisite tests are met for sufficiency of control of paramilitaries (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgement, I.C.J. Reports 1986*, pp. 62-65, paras. 109-115)" (117).

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(115) *Ibid.*, para. 213 of the judgment.
(116) *Ibid.*, para. 214.
(117) *Ibid.*, para. 160.

While acknowledging the Court's explicit reference in para.160 to ILC Articles 4 and 8 (though Article 5 is also mentioned), Palchetti notes (118) that the parties referred neither to ILC Article 4 nor to the *Nicaragua* case. He adds, however, that a reference to the "organ" test was possibly implied by Uganda in its counter-claim concerning attacks against Uganda by armed bands supported by the DRC, where it alleged that the attacks against Uganda "demonstrated that the anti-Uganda rebels were no longer just working in combination with the FAC [Forces Armées Congolaises], but were now *incorporated in the FAC and its command structure*" (119).

Although he does not discuss the alternative *de iure* or *de facto* organ, this author speaks, obviously stressing the latter hypothesis, of "incorporazione di fatto", a specification that I do not read in the quoted phrase of the *Counter-memorial*. The same author adds that Uganda's attorney Ian Brownlie, in addressing the same issue, pleaded that "[t]he circumstances of the present case are substantially at variance with the facts on which the Court relied in the Nicaragua case. In the present case, the organized activities aimed at Uganda were much more powerful in effect than the provision of weapons or logistical support. The armed bands formed part of a *command structure which involved the central Government of the Congo* [...]" (120). Turning in his comment to the Congolese position on the matter, Palchetti quotes Corten's statement — on Congo's behalf — that Uganda's position pursued the object "d'imputer au Congo tous les actes posés ensuite par ces forces rebelles qui seraient, en quelque sorte, des *agents de droit* de la République démocratique du Congo" (121), where the alternative seems to be resolved in favour of a (Congolese law) *de iure* organ, namely, an ILC Article 4 test based on attribution.

The point is, of course, a small one but it does not appear whether Ian Brownlie (or the Ugandan Government) was, in 2005, among the followers of the normative theory of attribution. Professor Palchetti seems, for sure, to be one, and Professor Corten another. Be it all as it may, one can hardly refrain from wondering — not without amusement — on which ILC "norm" or "norms" did any one of the quoted

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(118) *L'organo di fatto*, cit., p. 108, footnote 134.

(119) *Counter-memorial submitted by the Republic of Uganda*, vol. I, pp. 37-38 (emphasis added).

(120) Cfr. *I.C.J. Verbatim Record*, CR 2005/7, pp. 19-20 (emphasis added), where nothing is said about the organ's supposedly, factual or *de iure* nature

(121) *I.C.J. Verbatim Record,* CR 2005/11, p. 28 (emphasis added).

passages refer: Article 4, Article 4, para. 1, Article 4, para. 2, Article 8 or perhaps even Article 5? In any case, this is a telling example of the state of confusion into which all concerned are placed by the current ILC and ICJ attribution products and the governing, so widely accepted, normative concept of the attribution process (a supposed exception being Brownlie's early doubts about the concept).

13. Notwithstanding the noted criticism of *Nicaragua*, and despite the marked differences of very significant jurisprudential decisions preceding and following its *Nicaragua* judgment, the ICJ maintained inflexibly its course in the case concerning the *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*.

In its judgement of 26 February 2007 ([122]), after finding that a genocide had been perpetrated and excluding that that crime was attributable to *de iure* (Serbia and Montenegro's) organs either of the FRY or of the Srpska Republic, the ICJ recalled its own decision in *Nicaragua* and wondered whether "the persons or entities that committed the acts of genocide [note the plural] at Srebrenica had such ties with the FRY [as to] be deemed to have been completely dependent on it" ([123]). In addition to the *Nicaragua* precedent the Court recalled the "customary law" of international responsibility, specifying that that customary law was "laid down in Article 8 of the ILC Articles on State Responsibility" (para. 398), such provision to be understood "in the light of the Court's jurisprudence on the subject, particularly [...in the *Nicaragua* case] where the Court, after having rejected the argument that the *contras* were to be equated with organs of the United States [as] 'completely dependent on it', added that the responsibility of the Respondent could still arise if it were proved that it had itself directed or enforced the perpetration of the acts [...] alleged by the applicant State [...] [f]or this conduct to give rise to [United States] responsibility it would in principle have to be proved that that State had effective control of the [...] operations in the course of which the alleged violations were committed" (para. 399).

At the same time the Court, while recalling the "overall control" criterion set forth in the *Tadić* Appeal judgment, felt unable to subscribe to that ICTY Appeals Chamber's position (based upon the overall control test), in view of the fact that the ICTY was only

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([122]) *I.C.J. Reports*, 2007, p. 43 ff.

([123]) Summary, p. 14, corresponding, in the Judgment, to paras. 396 ff.

empowered to exercise a criminal jurisdiction "extend[ing] over [natural] persons only" (124), the *Tadić* precedent, therefore, being not of a nature to induce the Court to depart from its own interpretation and application of the ILC's "customary rule" in *Nicaragua* (para. 398).

On the basis of the *Nicaragua* precedent, the Court found: (i) that the Srebrenica "acts of genocide" could "not be attributed to the Respondent as having been committed by its organs or by persons or entities wholly dependent upon it" (thus not entailing on such basis the Respondent State's international responsibility); (ii) that "it ha[d] not been established that those massacres were committed on the instructions, or under the direction of organs of the Respondent State, nor that the Respondent exercised effective control over the operations in the course of which those massacres, which constituted the crime of genocide, were perpetrated" (125).

By way of final conclusion, the Court explained (in para. 406) both the rejection of the *Tadić* Appeal's "overall control" and the applicability of its own *Nicaragua* precedent in the following terms:

> "... the 'overall' test has the major drawback of broadening the scope of [...] responsibility well beyond the fundamental principle [...] that a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in complete dependence [*sic!*] on the State. Apart from these cases, a State's responsibility can be incurred for acts committed by persons or groups of persons — neither State organs nor to be equated with such organs — only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above (para. 398). This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the 'overall control' test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility" (126).

From the above quoted part of para. 406, one must conclude that in order to justify its rejection of the "overall control" criterion — a criterion rather solidly established both prior and after *Nicaragua* in

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(124) *I.C.J. Reports*, 2007, p. 209, para. 403.
(125) Summary, corresponding, in the Judgment, to paras. 395 and 413.
(126) *I.C.J. Reports*, 2007, p. 210.

State practice and international as well national decisions — the Court unpersuasively adduces just two reasons: one being that "a State is responsible only for its own conduct" and the other that the "overall control" criterion "stretches too far, almost to breaking point the connection which must exist between the conduct of State's organs and its international responsibility".

As keenly noted by Spinedi, the first argument is a tautology, obviously begging the question; the second is a matter of policy, not of law (127). The latter argument is also inconsistent with the Court's assumption that it is applying a rule of customary international law, not necessarily still the same since its alleged codification by the ILC. I recommend to the reader's attention the critique addressed to the *de lege lata* and *ferenda* impact of the Court's ruling. As contended by Spinedi, if the ICJ's policy choice were to prevail, a State will almost never be responsible for the internationally wrongful conduct of armed groups undertaking actions against other States (especially if they operate in foreign territory) even where it were proved that the State finances and organizes the armed group, works out its strategies and shares its objectives. According to the author, the possibility that such an armed group be recognized as an organ of the State appears — given the Court's criteria — to be a merely theoretical hypothesis. In the case of support supplied by a State to armed groups operating in other countries, it thus appears practically impossible to reach the conclusion that they should be equated with the said State's organs, and that the latter is internationally accountable of any of their actions. In the light of the criteria indicated by the Court it is also doubtful that one could ever consider totally dependent — since they adopt at times strategies that are not agreed — the "volunteers" who, in the course of national or international armed conflicts, operate at the side of the regular army. Consistency would impose, furthermore, that the same should be said of State-assisted terrorist groups (such as Al-Quaida) engaged in terrorist acts against other States. Under the Court's criteria, for example, Afghanistan could have been considered the author of the twin-towers attack only on the condition that it were proved that it had given the instruction to carry out the attack or exercised an effective control on that operation. The

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(127) SPINEDI, *L'attribuzione allo Stato di comportamenti di gruppi armati da esso sostenuti nella sentenza della Corte internazionale di giustizia sul genocidio in Bosnia-Erzegovina*, *Rivista di diritto int.*, 2007, p. 417 ss., at p. 422. An acute critical analysis is that of ARCARI, *L'attribuzione allo Stato di atti di genocidio nella sentenza della Corte internazionale di giustizia nel caso Bosnia-Erzegovina c. Serbia*, *Diritti umani e diritto internazionale*, 2007, p. 565 ff., especially pp. 569-573.

indicated criteria seem to exclude in conclusion, contrary to the opinion of other tribunals, the possibility of considering wholly State-dependent, and equated with State organs, the so-called "puppet-States", such as the North Cyprus-Turkish Republic or Transnistria: entities for whose conducts the European Human Rights Court has held totally accountable the dominant State without deeming it necessary to ascertain, case by case, if it had ordered the controlled entity's organs to hold the specific internationally wrongful conduct.

The only remaining condition for the attribution of an armed group's conduct are the State organ's instructions or "effective control". Even these criteria, though, will rarely lead to an attribution of conduct to the State, due to the great difficulty of proving the existence of its instructions, direction or control concerning the *specific* actions possibly triggering international responsibility. The *Nicaragua* and *Genocide* decisions are there to prove it. The State's responsibility may normally be predicated only for the aid given to the armed group where, for example, the aid given amounts to a wrongful intervention in another State's internal affairs or where there has been a violation of the prevention and/or repression obligation (128).

The manifest weakness of the Court's decisions in *Nicaragua* and *Genocide* are a pretty significant confirmation of the factual nature of attribution. And, had the Court not relied upon the alleged ILC's codified "customary norms", it would have presumably searched more thoroughly the factual grounds upon which the preceding State practice and arbitral and judicial decisions were based (instead of relying upon supposed, hastily considered customary rules). It might then have better decided its cases and offered a more reliable guidance to the subsequent case-law.

That policy considerations had too much weight upon the Court's decision is confirmed by the incomprehensible treatment of that major evidentiary issue that was raised by Bosnia-Herzegovina (claimant) when it evoked the FRY's Supreme Defence Council (SDC) documents as an essential element proving Serbia's direct involvement in the perpetration of genocide.

The Court's failure to order Serbia to produce those documents — with the rather questionable self-excuse that such an order might not be complied with — casts doubt, respectfully, over the Court President's press statement's claim that the Court had not been "seeking a

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(128) Also this language comes essentially from the cited Spinedi's article at p. 422 f.

political compromise". A Serbian refusal to produce the documents indicated by Bosnia would surely have justified an inference of responsibility of the Belgrade authorities (129). The doubt that the ICJ may have sought a political rather than a juridical solution is enhanced by the Court's unexplained rejection of the customary law value of the substantial current arbitral and judicial trend that had started at the latest in the early twentieth century (with *Zafiro*) and culminated in the *Tadić* Appeal judgment (and subsequent decisions), yoked with the Court's questionable choice to apply instead the strictest attribution criteria ever conceived or applied before (130).

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(129) See GROOME, *Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?*, *Fordham Int. Law Journal*, 2007, p. 911 ff., esp. p. 926 ff.; and ABASS, *Proving State Responsibility for Genocide: the ICJ in Bosnia v. Serbia and the International Commission of Inquiry for Darfur*, *ibid.,* pp. 871 ff., at p. 896 ff.

(130) CASSESE, *The* Nicaragua *and* Tadić *Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, *European Journal of Int. Law*, 2007 p. 649 ff.

The author rightly criticizes the ICJ's judgment on *Genocide* for rejecting *Tadić*: (i) on the absurd distinction of attribution for the purposes of State responsibility from the issue of internal/international conflict; and, (ii) on alleged "overly broadening" of the scope of State responsibility (p. 649). He also rightly contests that Article 8 of the ILC "reflects customary law" (as being "simply" predicated on the authority of the Court itself (the *Nicaragua* precedent) and the authority of the ILC. However, Cassese does not contest (and implicitly shares) the general *normative* view of attribution not only implicitly, at p. 651 and throughout the article, but also explicitly, when he dismisses the Court's distinction of attribution for State responsibility and attribution for the purpose of determining the internal or international nature of a conflict. Most importantly, Cassese asserts, in summarizing the *Tadić* Appeals judgment, and falling into the same error as the ICJ, that "international humanitarian law *did not contain any criteria* for determining the scope and the nature of [the] authority or control for the purpose of ascertaining whether armed units fighting within a State [...] belong to another State [...]. The necessary criteria [having] consequently to be found in those *general rules of international law* that established when individuals may be regarded as acting as *de facto* State officials, rules [that], the Appeals Chamber noted, *belonged to the body of law* of State responsibility" (pp. 655-656).

III.

A FEW SPECIAL REMARKS ON ARTICLES 4 AND 8 OF THE 2001 ILC ARTICLES ON STATE RESPONSIBILITY

CONTENTS: 14. Law and fact in the ILC's Chapter II's attribution tests. — 15. Article 4. — 16. Article 8.

14. The normative concept of attribution does not fare any better in the Draft Articles on State Responsibility for International Wrongful Acts or in the Commission's debates on the topic.

The study of the Articles reveals the simultaneous presence, in the "norms", of two not superimposable structures. One consists of the State's *de iure proprio* agents (organs or representatives) as qualified under municipal law by title and competence. The other one is the factual structure eventually added to or replacing the State's *de iure proprio* organization for the purposes of State responsibility. The difference, if any, calls for verification.

Our attention will be focused, in the following pages, mainly on Articles 4 and 8, surely the ILC's main contribution to the topic. Although far from irrelevant in the present writing, the Articles other than 4 and 8 seem to be either corollaries of Articles 4 or 8 (as is the case of Articles 5, 7, 9 and 11) [1] or relating to situations involving either a crisis in the supposedly respondent State, such as the case of an insurrectional or other movement (Article 10), or a relationship with another State (Article 6).

15. Article 4, that combines in a single article the substance of former Article 5, together with Articles 6 and 7, para.1, as adopted at

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[1] Article 5 deals with the conduct of persons belonging to the structures of elements of the State from the viewpoint of international law, such as departments, member States, provinces, cantons, *Länder* and municipalities, not distinguishable from the international person's structure from the viewpoint of international law. Article 7 is a corollary of both Articles 4 and/or 8. Article 9 deals with the hypothesis of emergency *de facto* exercise of State functions from the viewpoint of the State's national law itself, absorbed as such within Article 4. Article 11 is a corollary, or simply an integration or clarification of Article 8. For the text of these articles, see *infra*, Appendix.

the 1996 reading, proclaims at first sight, in both its paragraphs, a primacy of the State's municipal law comparable to that proposed by Ago in the Seventies and maintained in Article 5 in the 1996 text. Implied in the first paragraph, the primacy of internal law seems to be explicit in para. 2, under which "[a]n organ *includes* any person or entity which has that status *in accordance with the internal law* of the State" (emphasis added). This provision, however, while seemingly emphasizing by its tenor the primacy, if not the exclusivity, of the reference to municipal law, is described in the commentary in such terms as to make the reference to that law ambiguous if not utterly inconsistent.

After indicating at the outset that "para. 2 [of Article 4] explains the relevance of internal law in determining the status of a State organ", the ILC specifies further that "[w]here the law of a State characterizes an entity as an organ, no difficulty will arise. On the other hand it is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and adherence exclusively to internal law would be misleading. The internal law of a State may not classify, exhaustively or at all, which entities have the status of 'organs' [...]. Accordingly, a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law. This result is achieved by the use of the word 'includes' in para. 2" ([2]).

Much as it may surprise, the Article's commentary contradictorily suggests a connection of an individual or entity to the State, which finds its basis in some elements different from municipal law. However, the only element or elements traceable in the commentary's paragraph are "practice" and/or the fact of "a body which does in truth act as one of

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([2]) Para. 11 of the Commentary to Article 4 of the *Draft Articles on State Responsibility of States for Internationally Wrongful Acts,* in *Yearbook of the Int. Law Commission,* 2001, vol. II, Part Two, p. 42.

According to Crawford's explanation of the new draft Article 5 (which was to become Article 4), "Article 5, para. 1, combines into a single article the substance of former Articles 5, 6 and 7, para. 1. The reference to a 'State organ' *includes* an organ of any territorial governmental entity within the State, on the same basis as the central governmental organs of that State: this is made clear by the final phrase. Para. 2 *explains the relevance of internal law* in determining the status of a State organ. Characterization of an organ as such under internal law *is conclusive*, but on the other hand a State *cannot avoid responsibility* for the conduct of *a body which does in truth act as one of its organs* merely by denying it that status *under its own law*" (in *Revising the Draft Articles on State Responsibility*, *European Journal of Int. Law*, 1999, p. 435 ff., at p. 448, emphasis added).

[the State's] organs", assuming that the latter is not the same thing as practice. Considering that practice cannot reasonably be read as referring to the kind of practice consisting in a State's entrusting tasks to persons or entities not belonging to its legal structure, such hypothesis being contemplated in Article 8's test of the State's "instructions or direction or control", the reference to practice explains little, if anything, except for the inclusion of the term law obviously embracing judicial and administrative decisions. There remains, of course, the fact of "a body which does *in truth* act as one of [the State's] organs". There again, though, as "in truth" could not mean anything but "in reality", the only presumable understanding of the commentary's hypothesis is that of a person or entity acting *in fact* for (or on behalf of) the State in situations or circumstances supposedly not covered by Article 8, but not specified. Once more, Article 4 would add an undefined hypothesis broader than that of persons or entities acting on the State's "instructions, direction or control".

I venture again the suspicion that any reference other than to law (in its broadest sense) is just an unconscious admission (by Crawford, Simma and the whole Commission) that the basic attribution test is the factual « appurtenance » of the acting persons or entities to the State's organization.

Considering that the rather short debate in the ILC's plenary on Chapter II of the Articles does not tell much about the elements referred to in the commentary, any further help from *travaux préparatoires* could only be found in the 1998 Drafting Committee's works: and since that body's discussions are not recorded, there remains only Professor Simma's that same year's Report as Drafting Committee Chairman.

After describing the general wording of the first paragraph of Article 4, the Drafting Committee Chairman stated that "para. 2 recognized the significant role played by internal law in determining the status of a person or an entity within the structural framework of the State. That role was decisive when internal law affirmed that a person or an entity was an organ of the State. The commentary would explain that the term 'internal law' was used in a broad sense to include practice and convention. The commentary would also explain the supplementary role of international law in situations in which internal law provided no classification or an incorrect classification of a person or entity" (3).

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(3) *Yearbook of the Int. Law Commission*, 1998, vol. I, p. 287 ff., at p. 289, para. 77. Together with a number of useful indications, the 1998 *Summary Records* show a

What seems rather odd — apart from the unexplained very broad interpretation of the reference to internal law — is actually not so much the reference to "practice", but the fact that the notion of person or entity that "has that status in accordance with the internal law of the State" is explained by Crawford as a person or entity that "does in truth act as one of its organs".

A further mystery is the part of the commentary where it is stated that "while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an 'organ', internal law will not itself perform the task of classification. Even if it does so, the term 'organ' used in internal law may have a special meaning, and not the very broad meaning it has under Article 4" (4).

The apparently essential portion of Professor Simma's discourse is the reference to "the supplementary role of international law in situations in which internal law provided no classification or an incorrect classification of a person or entity". Nothing is said in the commentary about a "supplementary role" of international law, particularly of any condition or conditions for such a role to come into play other than the circumstance that internal law omitted classification of, or wrongly classified, the person or entity. The factual condition under which

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generally scarce degree of understanding, on the part of most ILC members, of elementary notions: (*a*) about the nature of the State's international person, uncritically assumed by them as juristic person; and, most importantly, (*b*) about the relationship between international law and municipal law. With regard to the latter crucial question, the Commission ignored particularly its importance for an operation like attribution that obviously situates itself — whether one views it as a factual or a juridical operation — precisely, at the point of theoretical confluence of international law and municipal law.

Widely shared, although mostly unexplained views were: (*a*) that the Article should contain a reference to internal law; (*b*) that the reference to internal law should not be exclusive as it was in the 1996 (Ago's) text in order to prevent States escaping liability by evoking lack of organ status in their internal law. On this point the Commission agreed with the Special Rapporteur about the necessity, after indicating the decisiveness of internal law, to broaden the notion of State organ by some device: and the device chosen was, in conformity with Crawford's suggestions, to integrate the reference to internal law by an expansion to practice, more specifically "practice, convention and so forth" (*Ibid.*, p. 229, para. 3). Such proposal became just practice in the commentary's para. 11; and "practice and convention" in the 1998 Drafting Committee Report. In addition, there was the reference, also proposed by Crawford in one of his writings, to extend attribution to "a body which does in truth act as one of [the State's] organs". Regrettably, neither practice alone, nor practice and convention, nor practice, convention and so forth (not to mention "in truth") is understandable as anything but *fact*: a reading that can only please any commentator who realizes that the normative theory of attribution is totally unfounded, attribution being simply a question of fact to be determined as such by the judge or arbitrator.

(4) *Yearbook of the Int. Law Commission*, vol. II, Part Two, p. 42.

international law's role would come into play remains, in so far as I am able to see, totally undisclosed either in the commentary or in the Drafting Committee Chairman's presentation. In his 2000 article in the *Revue générale*, Crawford writes about an "approche très différente [- in the 1998 Article 4 -] [sur] la question de la pertinence du droit interne dans la détermination des organes de l'Etat". According to Crawford, to the decisive internal law test of Ago's Article 5, the 2001 (or 1998) Article 4 prefers "ne pas permettre à l'Etat de définir lui-même l'étendue de sa responsabilité internationale et ne pas négliger l'éventualité que l'octroi du statut d' 'organe' par le droit interne ne reflète pas la réalité de l'exercice du pouvoir gouvernemental. En précisant qu' 'un organe comprend toute personne ou entité qui a ce statut d'après le droit interne de l'Etat' [in para. 2], la rédaction retenue [...] vise à exprimer une position de compromis: le droit interne [...] conserve sa primauté — mais ne tient plus un rôle exclusif dans la définition des organes de l'Etat; le droit international possède sur ce point une marge d'appréciation qui doit permettre de pallier les déficiences des déterminations internes" (5).

If I understand it correctly, this would be the explanation of international law's "supplementary role" (6). To put it bluntly, international law takes over — and provides directly to [...] *organizing the State* [...] with a view *to making it responsible* (*sic!*) — as if international law were not at liberty, by an apposite *primary* norm to impute liability on the mere basis of such a rule, like the one, for example, attributing responsibility to a State for any human rights violation occurring within its territorial or extraterritorial jurisdiction. In a more sensible, realistic view the only supplement one could really expect from international law, if no *de iure* organ status exists, is the attribution of responsibility on the ground that the situation was sufficiently covered by Article 8 (7).

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(5) CRAWFORD, BODEAU, PEEL, *La seconde lecture du projet d'articles sur la responsabilité des Etats de la Commission du droit international*, *Revue générale de droit int. public*, 2000, p. 914.

(6) A theory that seems to be similar, I assume, to the "transformation" theory discussed in the normative approach critique's section of the present article (*infra*, para. 21).

(7) In the face of such an inconsistency of language, it is difficult to understand Palchetti's consideration: "Ciò su cui l'art. 4 fonda la possibilità di riferire il comportamento dell'individuo allo Stato è l'esistenza di un legame 'organico'. Questa disposizione non precisa in che cosa esattamente consista tale legame. Dal significato che la Commissione mostra [where?] di attribuire alla nozione di organo si trae tuttavia un'indicazione nel senso che si tratti di un vincolo che sorgerebbe in corrispondenza con una effettiva integrazione all'interno della struttura di governo dello Stato" (PALCHETTI, *L'organo di fatto*, cit., p. 30 ff., pp. 30-31). It is an understatement to say

The interpretation difficulties raised by Article 4, particularly para. 2 — difficulties absent in (Ago's) Article 5 — are manifest both from the interpretation attempts that have so far been made or might be made in judicial decisions, and from that paragraph's hypothetically conceivable applications (in pre- or post-1971 cases).

Starting with the judicial decisions, notably those of the ICJ, the first case where Article 4 could have hypothetically played a role was *Hostages*. Assuming it were so, I submit, however, that the application of Article 4 to the case did not involve in any measure the 1998 Drafting Committee Chairman's "supplementary role of international law" allegedly implicit in the Article's para. 2. The militants having acquired, in the events' second stage, organ status under the revolutionary legal order of Iran, they would fall, *ex hypothesi*, under the core provision of Article 4, para. 1, namely, the municipal law test. Surely, no supplementary role for international law would be called for. Be that as it may, the militants would surely have been covered by Ago's and the 1996 first reading Article 5, where no supplementary role of international law was envisaged or conceivable. It is hardly necessary, for the moment, to note that the militants were adequately instigated by the highest Iranian officialdom for Article 8 (*a*) to be equally applicable, no supplementary role of international law being conceivable in that case either.

It is even less necessary to note that Article 4, especially para. 2, had no role to play in *Nicaragua* with regard to the *contras*' misdeeds, covered or not covered under Article 8. Article 4 could, perhaps, play some role with regard to the UCLAs. Had Article 4 implausibly come into the picture, anyway, the test would have been the United States municipal law, no supplementary role to be played by international law for the purposes of attribution (unless one thought of the role played by international law's primary rule ascribing liability).

An egregious chance for Article 4 to find application was instead the *Congo v. Uganda* case, where the organ status of the actors under Ugandan law was manifest. Again, though, no plausible reason for

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that the Commission's choice to extend the notion of organ seems not to be grounded on a "*particolare ricostruzione del fenomeno dell'attribuzione*" or that the only indication supplied by Crawford and the Commission with regard to the concept upon which "*la ricostruzione dei criteri di attribuzione*" has been decided is the idea "che lo Stato è un ente reale organizzato e che organi dello Stato sono gli individui e gli enti che compongono questa organizzazione" or, finally, that the abandonment of the exclusive reference to internal law was mainly motivated by practical considerations [such as practice prevailing over the normative order in many legal systems], or internal law frequently failing to classify the State's organs, or the possibility for a wrongdoing State to escape responsibility by denying the organic status of the acting person or persons (*ibid.*, *loc. cit.*, emphasis added).

international law to "supplement" can be traced, except, of course, for the merely passive acknowledgement of Uganda's armed forces belonging to that State: a merely factual state of affairs from the viewpoint of international law.

The remaining chance for Article 4 to be applied by the ICJ was *Genocide*, where the Court once more had chosen to refrain from an independent search of its own on the alleged customary law of attribution, and passively accepted the ILC rules. It did resort to Article 4 to assert a conceivable organ status of the Srpska Republic's under the law of Yugoslavia. Not recognizing, though, the puppet State's nature of that Republic, the Court failed to apply the internal law test of Article 4 and resorted, presumably, to international law's alleged supplementary role. That would seem to be an instance, perhaps, of the application of Simma's theory by the ICJ. The Court, however, turned the international law test into such a strict condition — the condition of the acting entity's "complete dependence [on the FRY]" as to place its pronouncement totally outside the ILC draft, in a sort of "no man's land" between Article 4, on the one hand, and Article 8 on the other. As Professor Brigitte Stern wittingly puts it, "[t]he ICJ seems thus to have created a new category of organs *de facto*, under Article 4, defined as persons or entities in complete dependence upon the State" (8). One may well wonder whether this is the kind of test described by the ILC's and Professor Simma's questionable (and in any case totally unexplained) international law's "supplementary role" (9).

Moving to other cases hypothetically relevant, and starting with the pre-Nineteenseventies ones, *Zafiro*, *Stephens, Youmans, Falcón, García, Roper, Eichmann* etc., originating as they essentially were from the conduct of members of the armed forces, the police, or persons under their control, they should all be ascribed, had the ILC 2001 product been available at that time, to Article 4's main test of internal law, no

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(8) STERN, *The Elements of an Internationally Wrongful Act*, in *The Law of International Responsibility* (Crawford, Pellet, Olleson eds.), cit., p. 206, further notes that "[h]owever, that category is somewhat difficult to distinguish from the persons and entities on which the State exercises effective control [*sic!*] under Article 8, and therefore appears to constitute a redundant category. Applying that test to the facts of the case, the Court did not consider that any of the involved entities could be considered to constitute *de facto* organs".

(9) The present writer is inclined to suspect that this ICJ's ... invention is another piece of evidence of the essential soundness of the "organizzazione effettiva" (Perassi's and Morelli's) test: a test shared by ANZILOTTI (*Corso di diritto internazionale*[4], Padova, 1955, p. 224 ff.). PALCHETTI, *L'organo di fatto*, cit., p. 8, note 12, quotes PERASSI, *Lezioni di diritto internazionale*, Padova, 1961, p. 105, and ROMANO, *Corso di diritto internazionale*[3], Padova, 1933, p. 207.

indication of a possible supplementary role of international law being conceivable. The acting persons involved were, at one and the same time, statutory organs under the internal law of the State involved and *factual* organs as any State's organs from the standpoint of international law.

Of the post-Nineteenseventies, post-1996 or post-2001 cases, an instance in point is, for example, *Loizidou*. That case could have fallen under Article 4 in view not only (or not so much) because of the not implausible classification of the Turkish Republic of Northern Cyprus (TRNC) as an "administrative subdivision" or extraterritorial governmental unit of the Turkish State (within an area subject to Turkish effective jurisdiction), but also, and more simply, in view of Turkey's massive military presence in the area: a state of affairs plausibly justifying, as envisaged also by other commentators, an application of a provision like Article 4. Again, however, the test involved would have been — *avant la lettre* — the core provision of Article 4 — namely internal law — no supplementary role for international law being logically necessary or plausible. Any of the organs involved in the situation — TRNC but, more plausibly, Turkish forces — were envisaged as possessing organ status under the municipal law of Turkey.

Of course, a likely alternative to Article 4 was Article 8 as broadly interpreted in the *Tadić* Appeal judgment and other cases; but surely not the mysterious, unexplained "supplementary role" of international law. Similarly, the *Yeager* case — viewed by the Iran-United States Claims Tribunal as a (1996) Article 8 (*a*) and (*b*) case (namely as a matter of "on behalf") or as a 2001 Article 8 case of "instructions, direction or control" — could also be viewed as a possible Article 4 case. There again, though, within the proper framework of the core of that provision, once more not as a matter of "supplementary role" of international law. Similar considerations apply, *mutatis mutandis*, to such cases as *Banković*, *Cyprus v. Turkey*, *Ilaşcu*, *Coard et Al.*, *Issa and Others*.

Considering what so far seems to be the total wantonness of the alleged international law's "supplementary role" within the framework of Article 4, I can leave that peculiar theory's thorough evaluation to the moment of discussing the more general problem of the existence for, or in, international law of a legal regime of attribution practically or theoretically distinct from the legal regime of liability and, of course, from the role of any customary or contractual international regulation of the procedure of attribution as a part of the regulation (general or special) of the judicial or arbitral process. That the alleged international

law role is non-existent, and in any case practically not desirable, is an opinion well founded in a state of affairs authoritatively acknowledged and described by scores of scholars, including Roberto Ago himself. In so teaching, Ago followed, in his Third Report, previous outstanding authorities on the nature of international law and international persons, and on the relationship of international law to municipal law (10).

In sum, by the presence in the ILC project of Article 4, together with the commentary thereto, the Commission implicitly admits the following.

Firstly, the exception supposedly expressed in para. 2 of Article 4 wipes out the Article's core rule: if the last word belongs to the factual state of affairs, the rule has no real impact and therefore no *raison d'être*, except for the imaginary supplementary role of international law.

Secondly, a State's conduct for international law purposes, particularly for the purposes of international responsibility, is the conduct of any individuals or entities composing the State's "effective organization" and any other individuals or entities in fact acting on the State's behalf: which implies, *inter alia*, that the States' international persons are factual, corporeal, space-filling aggregates of human beings (and — at least for the purposes of attribution — not juristic persons).

Thirdly, the attribution to a State of any actions or omissions (of any of the above mentioned individuals or entities) internationally complained of — unless the person or entity action or omission was carried out in a merely private capacity — is not the effect of any rule of national or international law, but the result of the intellectual operation carried out by the judge, arbitrator or whoever else needs to bridge the gap, on the basis of the factual (social, sociological and historical) causality, between the said actions or omissions and the respondent State.

Fourthly, to say, as in Article 4, that the State officials' conduct is attributable to the State (even if — as *per* Article 7 — it is *ultra vires*)

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(10) These authorities include the original Oppenheim, Triepel, Anzilotti, Perassi, Morelli. It is to the scholarship of such authorities that Ago adds his own authority to the effect that, from the standpoint of international law, States are factual aggregations of human beings independently and factually organized under original legal systems, not derived from international law. This state of affairs must still be reckoned with despite the fact that it is increasingly neglected — *hélas !* — in the more recent literature and teaching; and it was almost totally ignored by the ILC membership since about Ago's departure from the Commission.

is a platitude. The said provisions simply acknowledge the factual nature of the operation and its basis (11).

Fifthly, it is on the strength of an attribution effected on the basis of the above-mentioned factual elements that the relevant primary rules of international law trigger the State's international person's international responsibility.

Sixthly, it is unpersuasive that, as Palchetti suggested, "[a]ppare più fondato l'argomento [...] di un possibile uso distorto del criterio del riferimento esclusivo al diritto interno [...] [;] questo criterio fa dipendere l'attribuzione [...] da una determinazione della qualità di organo che è, in ultima analisi, rimessa allo Stato stesso [...] [,] situazione suscettibile di essere sfruttata da uno Stato per sottrarsi alla responsabilità internazionale [...]. L'adozione di un criterio che non attribuisce rilevanza soltanto al diritto interno può, sotto questo profilo, apparire giustificata da esigenze di sicurezza delle relazioni internazionali" (12). "Sicurezza", if *that* is the word, that is perfectly covered, I believe, by the "effective organization" criterion. The exception to the core provision of Article 4 demonstrates that that Article expresses not a rule, that the rule does not exist, and that in any case it is unnecessary, since the factual state of affairs prevails anyway (13).

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(11) As the Permanent Court put it in the *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Polish Republic) (The Merits)*, in *P.C.I.J.*, *Publications*, Series A, No. 7, 25 May 1926, p. 19: "[f]rom the standpoint of international law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures" (dictum re-iterated in the *Serbian Loans Case* (Series A, Nos. 20/21)). That dictum is usefully completed by the lines that immediately follow: "[t]he Court is not called upon to interpret the Polish Law as such [namely, to apply it in a proper sense]: but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying [in the proper sense] that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention". As explained in ARANGIO-RUIZ, *Dualism Revisited. International Law and Interindividual Law*, *Rivista di diritto int.*, 2003, p. 909 ff., at pp. 937-939, this is a still fully valid, soundly proved doctrine, despite any shortcomings the dualist theory may present from other points of view (on others among its many aspects).

(12) PALCHETTI, *L'organo di fatto,* cit., p. 32.

(13) The point was raised by some ILC Members, adds Palchetti, op. cit., p. 32, note 52. See especially Simma's statement in *Yearbook of the Int. Law Commission*, 1998, vol. I, p. 239, who said: "[i]n fact, considerations of legal certainty came into play and tended to limit the scope of general reference to national law" (pp. 287-292). Palchetti also adds, though, that no explicit reference to such considerations is contained in the commentary to Article 4. The Commission mentions these exigencies to justify the rule attributing the behaviour of organs exceeding their competence (see the commentary to Article 7 adopted in 2001, in *Yearbook of the Int. Law Commission*, 2001, vol. II, Part Two, p. 45). Fears of the consequences of excessive relevance of internal law had been expressed also in the course of the first reading. Palchetti refers

Conclusively, it is difficult to understand what reasons could have induced the ILC to introduce in Article 4 such an exception to the internal law test, as that suggested in the commentary or in the 1998 Drafting Committee Chairman's statement. One wonders whether the ILC had simply forgotten that Chapter II included an Article 8 supposedly envisaging broader tests such as those added in the same year 1998.

16. Except, perhaps, for the problematic, unclear Article 4 language *supposedly* justifying Simma's "supplementary role of international law", Article 8 — conduct of persons or entities acting in fact on behalf or on account of the State while lacking organ status under the internal law of the State — is the most difficult attribution "norm" of Chapter II. It is, by far, the rule most frequently rightly or wrongly called upon to play a role in the post-1971 attribution cases; and I submit that it is likely to be one of the main pitfalls of the normative theory and its applications by the ILC. Article 8 is actually the best, though unwanted, reflection of the factual essence of the attribution process. Another marked difference from Article 4 is that, while the latter provision's noted defects came about only in the course of the single 1998 session by the addition of the wanton and unexplained "supplementary role", Article 8's snags, though equally consummated in that same session, had originated well before, shortly after Ago's 1971 draft through a *crescendo* of contradictions and inconsistencies the most significant of which were the 1974 ILC (not surely Ago's) commentary to the Article and, more importantly, Ago's, in my view dramatic, 1986 ... apostasy in his Separate Opinion in *Nicaragua*, to end up in the 1998 formula.

Be it as it may of Ago's "on [the State's] behalf" and the reasons that led to its abandonment, Crawford's reform of the Article replacing that supposedly narrow test by a broader "on the instructions of, or under the direction or control of [the] State in carrying out the conduct" presents serious interpretation difficulties, due especially to the conclusive phrase (14). Although at first sight simple (as compared,

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to the considerations of Bartoš, *Yearbook of the Int. Law Commission*, 1973, vol. I, p. 52.

(14) In the 1974 ILC commentary to Article 8 (*a*), Ago's imaginative and flexible presentation was so shrunk as to reduce significantly the scope of the formula. In the 1980 *Hostages* "on behalf" was reduced to "instructions" or "instigation"; and the literature followed suit consolidating the narrow interpretation. In 1986 the first part of the *Nicaragua* judgment's para. 115 narrowed even more down the "instruction(s)"

for example, with *Nicaragua*'s "effective control of the ... operations"), that phrase is more problematic than it looks, when related to the alternative 1998 tests (15).

With regard to instruction(s) or authorization, the Article's wording tells clearly that object of that test is the *conduct* complained of by the injured State. For an attribution to be made on the strength of instruction(s), it is the private person's or entity's conduct internationally complained of that should have been directly and specifically instructed, instigated or authorized (16). The commentary helps to make even clearer what the Article's text states about the specificity of the object of the instruction(s) test. I wonder what Wolfrum exactly means when he says that in the instruction hypothesis the acting person or entity becomes a State's "extended arm" and therefore no attribution would be necessary (17). From my viewpoint, any State organ,

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introducing that stricter "direction or enforcement" that was hardly compensated by the same para. 115's "effective control of the operations in the course of which [the internationally questionable actions or omissions had occurred]". It so happened that despite James Crawford's clear above-quoted perception of the breadth of the "on behalf" formula's significance in the ordinary language, the Special Rapporteur felt presumably unable to propose that it be maintained. Inevitably, he was so conditioned by the consolidation of the "instruction(s)" test — authoritatively and ... authentically endorsed by Ago himself's *Nicaragua* Separate Opinion — that he felt obliged to broaden the scope of Article 8's test. Hence the addition of "instructions" (better, of course, than the ICJ's "direction or enforcement") as the alternative test of "direction or control".

(15) The effective control's target was, less stringently, the "operations in the course of which the alleged violations (namely the conduct complained of) were committed": an entirely different matter.

(16) As I see it, the person's or entity's conduct belongs factually to the State's just as a *nuncius* conduct belongs to the person using it, there being no reason to speak of the person's or entity's "transformation".

(17) WOLFRUM, *State Responsibility for Private Actors, an Old Problem of Renewed Relevance*, in *State Responsibility Today*, *Essays in Memory of Oscar Schachter* (Ragazzi ed.), Leiden/Boston, 2005, p. 423 ff., at p. 427. Apart from his implied adherence to the normative concept of the attribution process, other points I would wish to discuss with Professor Wolfrum are: (i) what about the "extended arm" metaphor in any other hypothesis?; (ii) who are those who represent what he calls the "commonly held view"? (p. 428); (iii) how about the control standard in *Nicaragua*, *Tadić* and other cases?; (iv) does he approve or not the ICJ position? (p. 428); (v) Article 8's and 9's different scenarios (p. 432); (vi) which is the *ratio* of the principle of no responsibility for private action? (pp. 424 and 433); (vii) why does he see "several questions" but deals with so few? (p. 428 f.); (viii) one thing is the sufficiency of control for the purposes of attribution, another thing the control that a State is due to exercise (pp. 431 and 433); (ix) what about the authorization to perform functions, services or missions? It is not clear why and in what sense he envisages some of those hypotheses as falling under the first test rather than the other two (pp. 427-428).

whether supposedly *de iure* or *de facto*, is a State's arm from the passive viewpoint of international law.

Another matter, however, seems to be the direction or control tests hypothesis in cases where the conduct in question is carried out by a private person or group recruited, instigated, employed or sent by the State to perform a given task, service or mission. A problem seems to be raised there in the Article's commentary, with regard to the scope of the State's liability for the private person's or group's conduct (18). In that respect, something different from the Article's tenor is manifestly (although obscurely) brought in by the commentary. Taking some distance from the Article's plain language, under which the object of direction or control is *one and the same* as the object of instruction(s), namely, "in carrying out the conduct", para. 3 of the commentary states that "[m]ore complex issues arise in determining whether conduct was carried out 'under the direction or control' of a State. Such conduct will be attributable to the State *only if it directed or controlled the specific operation* and the conduct complained of was an *integral part of that operation*. The principle does not extend to conduct which was only *incidentally or peripherally associated* with an *operation* and which *escaped* from the State's direction or control" (emphasis added) (19).

Considering that Article 8's text only deals with *conduct*, making the latter the direct object of the "direction or control" test (as well as of the instructions), it is not clear why the quoted lines bring up, instead of just conduct, an "operation" or "specific operation" to which the conduct would supposedly have to be related or unrelated. No explanation is given of the discrepancy inherent in the term "operation". Furthermore, despite the fact that no mention is made either, in the Article's text, of any distinction between "conduct/integral part of the operation", on the one hand, and "conduct incidentally or peripherally associated with an operation", on the other hand, the object of "direction or control" being in the Article, as noted, *only the conduct internationally complained of*, one stumbles into a second discrepancy from the Article's tenor, no explanation being given, once more, either in para. 3 or in para. 8 — where the "incidentality" hypothesis is again evoked — of the distinction between "integral part", on the one hand, and "incidentally or peripherally associated with", on the other hand, used to qualify the relationship between "operation", on the one side, and "[internationally complained of] conduct" on the other side.

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(18) Para. 2 of the Commentary.

(19) *Yearbook of the Int. Law Commission*, 2001, vol. II, Part Two, p. 47.

In the presence of such substantial differences between text and commentary, one wonders whether the quoted passages (as well as other mentions of the distinction in the same commentary) should be understood as interpretive statements or, rather, as annexes to Article 8; and one also wonders whether the 2001 commentary was the product of the Special Rapporteur or of someone else: and, in any case, whether the Commission's membership ever approved such a problematic commentary. Another explanation might be that the Commission was so confused, in drafting Article 8's commentary, that it ended up by interpolating the term "operations" under the spell of *Nicaragua*'s para. 115 *in fine*: — overlooking, though, that that term was specifically justified by the fact that the misdeeds Nicaragua complained of had occurred *in the course of* "[military or paramilitary] *operations*".

Be it as it may of the conceivable explanations, the commentary's language under review brings about an interpretation of Article 8 which appears in insurmountable inconsistency with both the allegedly commented text and the rationale of the issue's solution. Indeed, were the said language to prevail in the application of Article 8, any internationally condemnable conduct by a private person or group entrusted by a State with some task, service or mission, would not be attributable to that State unless it fell expressly and entirely within the scope of the entrusted task, service or mission. Any internationally condemnable conduct falling outside that scope (as originally defined, or "instructed", by the State's organs) would be attributable only if it were specifically included in the person's or group's original mandate and directed or controlled as such, or *ad hoc* (specifically) authorized.

Such an interpretation, however, is manifestly inconsistent with Article 8's clear tenor, the wording of which could not be altered by a commentary. Secondly, it would be incompatible with the (general) principle that a State is accountable for the conduct of any element — ordinary or special, permanent or temporary and whether *de iure* or *de facto* from the standpoint of the State's legal system — of its organizational structure. Under that principle, no State can evade responsibility by entrusting private persons or groups with tasks, services or missions the performance of which would bring about internationally wrongful acts or omissions. Furthermore, the commentary's above reviewed interpretation of Article 8 is expressly condemned, within the very context of the Commission's attribution "norms", by Article 7: according to which, in conformity with the said principle, a State's international responsibility is engaged by its officials *ultra vires* conduct

as well as by the acts or omissions they commit within the scope of their competence, the only universally admitted exception being the case where the acts or omissions are undertaken in a purely personal and private capacity. It would be inconceivable that the principle embodied in Article 7 were not to apply to any internationally condemnable act or omission of private persons or groups acting on the State's behalf.

It seems inevitable, at this point, to wonder to what extent Article 8's regime of instruction(s) and the regime of direction or control are as independent as they look at first sight. While in principle authorization stands, so to speak, alone, well separate from direction or control, there may occur, between them, some interrelations. In addition to the specific instructions envisaged within the framework of the instructions test alternative, in which the entrusted conduct supposedly consists of a specific, concrete task or mission (such as an espionage, sabotage or abduction operation), instructions may come into play within two more contexts.

Firstly, one must reckon the more or less general instructions that are presumably implicit in the commentary para. 2's non covert "recruit[ing]", "commission[ing], "employ[ing]", "send[ing]" etc. of private persons or groups to perform on the State's behalf functions, services or missions in principle not involving internationally objectionable actions or omissions. A good example could be auxiliary troops or materiel transportation, concentration camp management or officers mess management. Considering that the attribution's purpose is that of imputing international responsibility, no such responsibility could reasonably be predicated *ipso facto* for any internationally indifferent activity carried out by the recruited, commissioned, or employed persons or groups *in the performance* of the entrusted task or service, the conceivable *object* of the "fact[ual] authoriz[ation]" dealt with in the paragraph in question possibly being only — in conformity with Article 8's conclusive phrase — *the (carried out) conduct internationally complained of*: not, surely, *any* conduct held by the recruited persons or groups in the internationally indifferent performance of their assigned task or service.

Secondly, one should reckon the supplementary specific instructions that in the course of the performance of an internationally indifferent task or service the State could address to the employed person or group for the latter to carry out any *conduct internationally complained of*, unless, of course, the State pursued the same result by having the wrongful conduct carried out under its own direction or

control ([20]). It is also worth noting that the commentary's para. 3's ambiguous phrasing (notably the "*if* it *controlled*" and "which *escaped* the State's... *control*") seems actually — unwillingly but not less dangerously — to imply that by alleging (its own!) failure to control, the State could evade, in certain circumstances, its liability.

Though recommended to the attention of Member States by the UN General Assembly, the ILC's Articles on State responsibility have not gone through a diplomatic conference with a view to their adoption as an international convention, as has been the case for a number of ILC drafts. It is to be hoped, concerning Chapter II of the 2001 Articles, that no such step be taken; and if a conference were ever to be convened, that justice would be done of the alleged "norms" on attribution embodied in that chapter. For the time being, it is to be hoped that at least such attribution "norms" as that of Article 8 (not to mention Article 4) obtain no support in international decisions.

Finding no satisfactory explanation of the serious above-mentioned snags — especially of the inconsistencies between the Article's text and its commentary — one naturally turns for enlightenment to the arbitral and judicial decisions referred to in the commentary, especially in paras. 5 ff., dealing with the "direction and control" hypothesis.

A special attention must be given to the cases cited in the commentary's footnotes 160-165 (relating to para. 6 of the commentary to Article 8), a considerable number of which come from the Iran-United States Claims Tribunal (IUSCT) and are apparently recalled to illustrate the operation of the "direction or control" tests.

Starrett Housing Corp., cited in footnote 160 ([21]) together with *Yeager* and *Loizidou*, as an example of the degree of control necessary for the attribution of conduct to the State, does not seem to involve an Article 8 attribution. At p. 143 of the decision — one of the few cases of specific page citation, most of the other citations mentioning only the initial page — attribution is dealt with only with regard to the question whether two banks and the Government of Iran "are properly Respondents in this case", this question being resolved by the Tribunal in the sense that the Claimant's claims "are directed exclusively against the Government [...] of Iran. There can be no doubt that these claims are

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([20]) It is perhaps because of such above-mentioned interrelations that Professor Wolfrum seems to envisage, in his cited article's pp. 427-428, a hypothesis that appears to fall outside the main scenario of Article 8's instructions test alternative.

([21]) *Yearbook of the Int. Law Commission*, 2001, vol. II, Part Two, p. 48.

attributable to the Government" (22). There was no question, in this passage, of *attribution of conduct* or, for that matter, *of responsibility*. Attribution of conduct was, of course, decided upon by the Tribunal. This operation, however, was hardly spelled out in express words. Once the Tribunal was satisfied that a taking of Starrett's assets had occurred as a consequence of governmental action, responsibility was attributed to the Islamic Republic as a matter of course (23).

Regarding *Loizidou* (*supra*, para. 11), whatever the merits of the European Court's decision to base attribution upon Turkey's (military) overall control of the Cypriot Turkish Republic, it seems difficult to justify that decision under the 2001 Article 8, restricted as that test is by the phrase "in carrying out the conduct". To the extent that the Court considered attribution to Turkey, it is difficult to imagine that the Turkish Government *specifically* directed or controlled the actions of TNRC (Turkish Republic of Northern Cyprus) authorities interfering with the claimant's property. Ago's "on behalf" — prior, of course, to its restrictive interpretation — would surely have fared better in the case.

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(22) *Starrett Housing Corp. v. Iran*, Chamber One, 19 December 1983, in IUSCTR, vol. 4, 1983, p. 122 ff., at p. 143.

(23) One of the three-members Chamber that issued the Interlocutory Award appended a concurring Opinion that questioned some not decisive aspects of the decision, particularly with regard to the dating of the company's taking, the latter operation having been a longer process started some months earlier than the date determined by the Chamber's majority. None of the episodes stressed in the Opinion could have caused any alteration in the attribution of the event to Iran's governmental action that could have justified, in my view, the application of Article 8 (*a*) of the ILC project as it stood at the time. The perusal of the Opinion, furthermore, offers valuable data that illustrate the complex multiplicity of the factors (and individual actions or omissions) making up, so to speak, a State's (notably a State coming out of a revolution) "aggregate" conduct: considerations confirming the implausibility of the normative theory and the plausibility of the factual nature of the attribution process. The same judge also stressed "that during the [relevant] period the Project was hampered by strikes in the public and private sectors of the Iranian economy, shortages of building materials and fuel, and blockage of port and customs services which prevented delivery of needed materials from abroad. Claimants contend that these events constituted force majeure and expropriation as early as December 1978. It seems clear that these events did create a force majeure situation for Starrett. They may also have constituted a taking since under international law the Islamic Republic of Iran is responsible for the acts of the successful group which brought about the victory of the Revolution". The reasoning opens the way to the possibility that the State were found also liable for "failure to protect" foreign nationals in clear danger of xenophobic outrages.

Moving to the cases cited in footnote 162 (24), *Schering Corporation* (25) does not seem relevant for the illustration of the point made in the text, namely "The fact that the State initially establishes a corporate entity, whether by special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity". In the case in question, the Tribunal discussed whether the behaviour of a Workers' Council (whose representatives' vote was decisive for some of the Schering Corporation's decisions) was attributable to Iran: and after noting that the fact "that the formation of the Workers' Council was initiated by the State [did] not in itself imply that the Councils were to function as part of the State's machinery", namely exercise public functions, the Tribunal considered whether the Council acted in fact on behalf of the Iranian Government; and concluded that such was not the case because there was no evidence that the Government interfered in the election of the Council's members or imparted them instructions or directions.

In the second case cited in footnote 162, *Otis Elevator* (26) (where a Workers' Council appears again), the Tribunal seemed to imply the non-existence of public functions in the entity concerned and concluded that for attribution of the Council's interferences to Iran, the claimant should have proved that the Council's decisions it complained of had been taken under the influence of the Ministry of Trade (p. 33 of the Award). There was thus a negative application, one should assume, of Article 8 (*a*) as it currently stood. It should not be overlooked, however, that the conduct complained of was differently evaluated by dissenting Judge Aldrich, in whose opinion attribution should have been predicated not because of the Workers' conduct *per se* but rather on the ground of governmental agencies' support of the Workers' Council (27).

The cases in footnote 164 are intended to illustrate the principle that the conduct of companies exercising public functions are attributable to the State. In *Phillips* (28), despite the fact that National Iranian

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(24) *Yearbook of the Int. Law Commission*, 2001, vol. II, Part Two, p. 48.

(25) *Schering Corporation v. Islamic Republic of Iran,* in IUSCTR, vol. 5, 1984, p. 361 ff.

(26) *Otis Elevator Co. v. Islamic Republic of Iran*, in IUSCTR, vol. 14, 1987, p. 283 ff.

(27) See also ALDRICH, *The Jurisprudence of the Iran-United States Claims Tribunal: An Analysis of the Decisions of the Tribunal*, Oxford, 1996, p. 204.

(28) *Phillips Petroleum Co. Iran v. Islamic Republic of Iran*, in IUSCTR, vol. 21, 1989, p. 79 ff.

Oil Company (NIOC) was not formally a part of the State's formal structure, the Tribunal attributed that entity's conduct to Iran as it performed governmental functions, citing in support then current Article 7, para. 2. In *Petrolane* ([29]) the question was whether the taking complained of, allegedly carried out by persons qualifying themselves as operating for the Foundation of the Oppressed (an entity recognized by the Tribunal as exercising public functions), was attributable to Iran (supposedly under the same rule of Article 7, para. 2). Attribution to Iran was denied because the Tribunal was not satisfied that the acting persons belonged to the Foundation or were sent there (paras. 82-83 of the decision). One cannot speak really of any application of Article 8 (*a*)'s "on behalf".

The third principle set forth in Article 8 commentary's para. 6 is that the conduct of State-owned companies not entrusted with public functions is not attributed to the State, unless it is proved that the State has used its ownership rights to direct the company to carry out the internationally objectionable conduct. Note 163 of the ILC commentary cites *Sedco*, *International Technical Products* and *Flexi-Van Leasing* ([30]). In *Sedco* the Tribunal attributed NIOC's conduct to the State referring to the precedent *Oil Field of Texas Inc.* and citing again then Article 7, para. 2. Article 8 was once more not considered. Regarding *Flexi-Van Leasing*, it seems to be appropriately quoted ([31]). The same

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([29]) *Petrolane, Inc., v. Islamic Republic of Iran*, in IUSCTR, vol. 27, p. 64 ff.

([30]) *SEDCO, Inc. v. National Iranian Oil Co.* (NIOC), in IUSCTR, vol. 15, 1987, p. 309 ff.; *International Technical Products Corp. v. Islamic Republic of Iran*, in IUSCTR, vol. 9, 1985, p. 206 ff.; *Flexi-Van Leasing, Inc. v. Islamic Republic of Iran,* in IUSCTR, vol. 12, 1986, p. 335 ff.

([31]) It was significant that the claimant in *Flexi-Van Leasing* did not allege that the Government itself had interfered with its contractual rights; rather, its theory was that the Government had done so through the actions of the Foundation for the Oppressed. The Tribunal held that this theory of recovery had significant consequences for the question of attributability. "The mere fact that the Government through the Foundation controls Star Line does not as such encompass an expropriation of the Claimant's rights that derive from its lease agreements with Star Line. Expropriation of the Claimant's contract rights can only be found in case of interference with these contract rights themselves, and a basic condition for such a finding is that such interference be attributable to the Government" (*Flexi-Van Leasing*, cit., pp. 348-349). Accordingly, the Tribunal stated that to establish the liability of the Government in such a situation, the claimant was required to show direct governmental interference with the contracts, such as "orders, directives, recommendations or instructions" issued to the corporations by the governmental agency controlling them. In the absence of evidence of such direct governmental interference, it concluded that there had been no taking of the rights associated with the contracts entered into by those corporations (*Flexi-Van Leasing* again and *Amoco*, Partial Award 310-56-3, 14 July 1987, in IUSCTR, vol. 15, 1987, p. 189).

does not apply to *International Technical Products*, that appears not to deal with the problem evoked in the commentary's relevant passage. The Tribunal held that to hold the Iranian Government liable for the misdeed of a Government-owned bank (Bank Tejerat) would require either that the Bank was acting as a State organ (rather than as a commercial entity); or that the Government or one of its organs was an accessory to the transfer (p. 48). The Tribunal held that the Bank had acted as a commercial entity in acquiring real estate, within the scope of its ordinary operations (pp. 46-47). Thus, even if the Bank had acted unlawfully, Iran's responsibility would not be established (32).

The last part of the commentary's para. 6 refers, in its footnote 165, to *Foremost Tehran* and *American Bell* (33). The first case is not very pertinent. Pak Diary was formally a private company but largely Government-owned and with a board of directors composed in majority of government appointees. The Tribunal, considering whether the company could be regarded as a controlled entity under Article VII, para. 3, of the Claims Settlement Declaration (CSD) relating to the Tribunal's jurisdiction, concluded affirmatively (p. 10 of the award). This, however, is a question partially different from whether the company's acts are *attributable* to Iran, the entity to be considered as acting for the State (34). It is possible, therefore, that *Foremost Tehran* was cited as an application of Article 8, because one calculated, among Pak Diary's securities in the hands of public entities necessary to obtain 52%, also securities in the hands of private farmers but actually controlled and managed by the Financial Organization (p. 10), which is a public entity. In another part of the Award, the Tribunal discussed whether the failure of payment of dividends to the claimant on the part of Pak Diary could be considered as an interference in the claimant's

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In his Hague course, Brower deals with *Flexi-Van Leasing*. Brower's summary tells that the Tribunal found that "the mere assumption of ownership and control over the two corporations [with which claimant *Flexi-Van Leasing* had been doing business and who failed to honor their contracts with Claimant] did not constitute a taking of the rights associated with the contracts entered into by those corporations" (BROWER, *The Iran-United States Claims Tribunal*, *Recueil des cours*, vol. 224, 1990-V, pp. 323-324). The general principle on proof of interference is confirmed in BROWER, BRUESCHKE, *The Iran-United States Claims Tribunal*, Leiden, 1998, p. 442, note 2080.

(32) BROWER in his Hague Course of 1990, cit., p. 324.

(33) *Foremost Tehran, Inc. v. Islamic Republic of Iran*, in IUSCTR, vol. 10, 1986, p. 228 ff.; *American Bell International Inc. v. Islamic Republic of Iran*, in IUSCTR, vol. 12, 1986, p. 170 ff. Footnote 165 cites also a few ECHR cases.

(34) On *Foremost Tehran*, see BROWER, BRUESCHKE, *The Iran-United States*, cit., pp. 113-115, 436-438. On *Yeager* see *ibid.*, p. 452.

rights. The Tribunal concluded affirmatively: "such interference, attributable to the Iranian Government or other State organs of Iran, while not amounting to an expropriation, gives rise to a right to compensation for the loss of enjoyment of the property" (p. 17). It is not (quite) clear, though, whether attribution to Iran was predicated merely for the fact that Pak Diary was controlled by Iran or in view of the fact — unknown? — that the relevant Pak Diary decision had been taken on the basis of directions from the Government or some other public entity, thus falling under the Article 8 hypothesis: a point apparently overlooked by the commentary's author.

Regarding *American Bell*, although no conclusion seems to have been reached by the Tribunal, Judge Aldrich believes (35) that in this case the Tribunal did find liability (of the State) for loss of funds in a bank account, which the claimant's representative in Iran had been forced by a Government Minister to transfer to the Ministry. It would thus seem to have been a matter for Article 5 rather than Article 8.

Kathryn Faye Hilt (36) is cited by Brower (37). According to his reading, the Tribunal declined to decide whether a University official of a government-controlled University "can be regarded as a representative of a government for the purpose of issuing a *de iure* expulsion order" that would be attributable to the State.

The presentation of such an array of wrongly appraised cases adds further reasons to doubt James Crawford's authorship of those paragraphs and footnotes (38).

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(35) ALDRICH, *The Jurisprudence*, cit., p. 211.

(36) Award of 16 March 1988, in IUSCTR, vol.18, 1988, p. 154 ff., at pp. 161-162.

(37) BROWER, BRUESCHKE, *The Iran-United States*, cit., p. 447, footnote 2110.

(38) Although it had before it, since 1981, a substantial practice of the Iran-US Claims Tribunal (IUSCT) involving attribution issues, the ILC seems to have seen in that practice far more numerous applications of Article 8 tests than those effectively considered by the Tribunal. It has thus profited less than it could have from the IUSCT case-law from the viewpoint of both its Article 8's and commentary's elaboration and the alternative between the factual and the normative approach to attribution. Indeed, on the latter point it was correct enough in not claiming to find in that practice any *decisive support* for the normative theory, although a few references to an internationally regulated attribution process appear in some of that Tribunal's *dicta*. Conversely, the ILC seems not to take the least notice of the instances where the said Tribunal's language — as well as the language of the authoritative commentators (Judges Aldrich and Brower) — seems implicitly to lend some comfort to a factual approach that could have induced the Commission (at work on the subject only about a decade before IUSCT was set up in 1981) to doubt the possibility of identifying attribution tests sufficiently precise to be translated in attribution norms intended to bind for a reasonably length of time international and national judges and arbitrators with the

The seriousness of Article 8's commentary's snags suggests that a good look be taken at the cause of the poor quality of the provisions in question. Although an impatient reader might well consider such a research redundant as not indispensable for the proper understanding of Article 8 and its application, a review of the process through which Article 8 and its commentary have been drafted is not deprived of utility. In addition to the clarification of the attribution issues covered by Article 8, the study of the latter provision's vicissitudes is, in my opinion, quite instructive not only from the viewpoint of the merits and demerits of the normative concept of attribution. It is also instructive with regard to the proper method that should be followed in the determination — for the purposes of codification and even more for the purposes of adjudication — of the rules of customary international law or what one believes such rules to be.

The history of Article 8 and its commentaries from 1971 to 2001 is indeed an excellent illustration of the pitfalls the quasi-legislators of the ILC and international judges and arbitrators — the ICJ in the first place — should beware of when they are called upon to look for rules of unwritten law. Although the essential part of Article 8's history begins about thirty years earlier, the matter's decisive treatment occurred at the Commission's 1998 session after it had been dormant, except for an interruption in 1988, for a considerable length of time. James Crawford's 1998 approach to the draft that was to become Article 8 of Chapter II of 2001 *Draft Articles on Responsibility of States for Internationally Wrongful Acts* was influenced by three factors, the main of which was the currently prevailing understanding of Ago's

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force of what was soon to be consecrated by the ICJ (on the wake of the ILC itself) as customary international law, envisaged at the time as a set of rules possibly to be further nailed down by a diplomatically adopted convention (at that time not yet set aside as happily, for the time being, it has been).

For the sake of clarity and brevity I have referred particularly to Judges George Aldrich's and Charles Brower's writings on the IUSCT case-law, particularly to the variety and variability, emerging from these works, of the factual data relating to the attribution to the Respondent State of a number of entities operating in Iran in the period that followed the revolution and saw the settling down of the new legal order of Iran. The cases involve persons or entities like the revolutionary Guards, Komitehs, Foundation of the Oppressed People, Workers' Councils or unions and even Revolutionary Prosecutor(s). The time and space variety of the attention devoted by IUSCT to the status of entities such as those with a view to asserting or denying their commissive or omissive conduct's attribution to the State are very telling from the viewpoint of the nature of the "*intellectual operation* necessary to bridge the gap between the delinquency of the organ or official and the *attribution of breach and liability to the State*" (STARKE, op. cit., p. 105, emphasis added).

1971 "on behalf" as the strict "instructions" test, that Ago himself had stressed in his Separate Opinion in *Nicaragua.* Another factor was the *Nicaragua* judgment itself, in para. 115 of which the Special Rapporteur faced, on the one hand, an adherence to the strictest instructions test (the Court's "directed or enforced", French "ordonné ou imposé") making Ago's "on behalf" even stricter than just instructions, and, on the other hand, the obscure "effective control of the operations" test set forth by the Court as a possible (unclear) alternative attribution test (39). Although the latter test was equally unsuccessfully resorted to in the case, the Special Rapporteur thought nevertheless that in the Court's opinion Ago's "on behalf" (viewed as "instruction(s)") was not, due to the difficulty of proving instructions — or even actual or express instructions — an adequate answer to the issue of attribution of private persons' or group's conduct (40) . The narrow interpretation of 1971 "on behalf" in the first part of the *Nicaragua* judgment's para. 115 had been narrowed down even further by its very author in his above-mentioned Separate Opinion. The third factor of Crawford's review were the decisions of cases such as *Zafiro* and *Stephens*, cited in Ago's Third Report and in the 1974 ILC commentary to Article 8 (*a*), adding

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(39) According to Crawford's reading of *Nicaragua*, the Court "was prepared to hold the United States responsible for conduct of the contras in the course of specific operations over which the United States was shown to have 'effective control', whereas Judge Ago required nothing less than specific authorization of the wrongful conduct itself" (*First Report*, cit., p. 40. para. 200).

(40) As explained by Crawford, "[t]he question [was] whether Article 8 (*a*) should extend beyond cases of actual authorization or instruction to cover cases where specific operations or activities are, in fact, under the direction or control of the State. The present text ('in fact acting on behalf of that State') is less than clear on the point, but Judge Ago seems to have thought that it was limited to cases of express instructions" (*First Report*, cit., p. 43, para. 212).

In his article *La seconde lecture*, cit., Crawford writes that "[s]elon la conception restrictive développée sur ce point dans l'ancien Article 8, était 'considéré comme un fait de l'Etat [...] le comportement d'une personne ou d'un groupe de personnes si [...] il est établi que cette personne ou ce groupe de personnes agissait *en fait pour le compte de l'Etat*'. En pratique, cependant, il sera souvent très difficile d'apporter la preuve qu'une personne a agi sur *instructions expresses* de l'Etat. Dans l'affaire du *Nicaragua*, la Cour a préféré retenir le critère plus souple du 'contrôle effectif' [...]. Les critiques dont ce critère a par la suite fait l'objet, dans l'affaire *Tadić* notamment, ont moins porté sur le principe de cette forme d'attribution que sur son interprétation et sur ses modalités d'application" (p. 915, emphasis added).

It seems that it was actually the ICJ's (additional) reference in *Nicaragua* to an "effective control" criterion that suggested to Special Rapporteur Crawford to add to (if not substitute for) Ago's Article 8's "on behalf" (read as "instructions") the "or directed or controlled" (still with regard, though, to the specific conduct complained of).

Yeager and *Loizidou* (cited in some government or governments' comment: and somehow viewed by Crawford as relevant).

Under the influence of such elements, James Crawford devised the "instructions, direction and control" formula that, while conceived as a broader test thanks to the alternative additions of "direction and control". He introduced, on the other hand, also the restrictive phrase "in carrying out the conduct": a restriction that was not only absent in Ago' article 8; it was not present either in *Nicaragua*, where the object (target) of "effective control" were the "*military or paramilitary operations*", not the very conduct complained of. The 1998 restrictive phrase was present neither in the decisions of the cases cited by the Special Rapporteur, nor, for that matter, in the important subsequent decisions.

On reflection, James Crawford's attempt to broaden Ago's Article 8's "on behalf", seems to be neither justified by the above-mentioned factors nor likely to attain his declared objective. The narrow interpretation of "on behalf" in the ICJ's jurisprudence (*Hostages* and *Nicaragua*) and in the literature seems to be justified neither by the article's tenor, nor, and most importantly, by the comprehensive illustration preceding its 1971 formulation (in Ago's *Third Report*, cit., p. 263 ff., paras. 190-194).

There was surely not enough also in paras. 7 and 8 of the relevant 1974 commentary to Article 8 (*a*) for a reading of "on behalf" in terms of instruction(s) to be so easily and hastily canonized — after being implicitly applied, as some say, in *Hostages* first stage and made explicit with, *hélas*, Ago's own concurrence — in an even stronger version in *Nicaragua*.

Firstly, in the original Article 8's tenor the ordinary meaning of "on behalf" was surely not — as Crawford rightly notes in para. 197 of his First Report — the equivalent of "on instruction(s)". "As a matter of ordinary language — he states — a person may be said to act 'on behalf' of another person without any actual instruction or mandate from that other person" (41). Secondly, the "many different situations" envisaged by Ago within what he indicated as a "*very wide ... range of possibilities*" included, as already mentioned, a number of hypotheses

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(41) CRAWFORD, *First Report*, cit., p. 40. I would prefer to say, "specific" instead of "actual"; but I would join the Special Rapporteur in doubting "To what extent should *de facto* agency be limited to express agency" (*ibid.*), adding just some reservation with regard to the term "agency" if extended to the merely factual relationship existing, from the viewpoint of international law, between a State and any of its *de jure* or *de facto* organs.

which cannot be reconciled with the imparting of previous instructions (42).

It is, therefore, difficult to agree on the narrow understanding of the "on behalf" test as instruction(s) *to commit the action or omission internationally complained of*.

Regrettably, as noted *supra* in para. 8, a partly rather different picture of "on behalf" was to be drawn in the ILC 1974 commentary to article 8 (*a*). Less emphasis is put on those *public "services" or "functions"* that were so generously described in Ago's 1971 presentation; and the commentary leaves entirely out of the picture such items as those listed in Ago's Third Report's paras. 190-191.

It would of course be unfair, in the presence of such an involution, to blame James Crawford for giving up the ordinary meaning of "on behalf" and assuming that the only attribution test he inherited from Ago was that of "instruction(s)". Together with the scarcely imaginative Commission's membership, he could, however, have tried to set aside Ago's apostasy of 1986 for the sake of Ago himself's original concept. He could have found not only some support in the recognized ordinary meaning of "on behalf" but even more support in arbitral and judicial decisions other than the ICJ's *Nicaragua* pronouncement. The proximate cause of the abandonment of "on behalf" in 1998 was clearly the latter (unfortunate) pronouncement. Respect for the ICJ should not have prevented, though, the Commission to take into serious account the questionableness of the ICJ's pronouncement (together with the generally admitted reluctance of the ICJ to engage in serious research on the determination of international customary law), not to mention the utter inconsistency of Judge Ago's Separate Opinion with Special Rapporteur Ago's 1971 illustration of his term "on behalf". Had the Commission not hastened (and been pressed by the General Assembly) to put an early end to the topic, James Crawford's justified but precipitous dissatisfaction with the "on behalf/instruction(s)" approach could have induced him to a more prudent choice in light of both Ago's Third Report's masterly paragraphs and some more judicial and arbitral decisions. Regrettably, he was unable to resist the negative and the positive *volet* of the ICJ's and Ago's *Nicaragua* message. In the latter decision he found on the one hand confirmation of the narrow understanding of "on behalf"; on the other, the suggestion of a way out of what looked to him like the consolidated strictures of the instruc-

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(42) See *supra*, p. 29.

tion(s) test. From the first message he was induced to broadening somehow Article 8's test. The second message induced him to add the two, supposedly broadening, alternative tests of "direction" and "control". Anyway, one fails to see why — except for an unjustified obsequiousness of a subsidiary organ to the Court's formally higher UN Charter status — the Commission should have accepted *tel quel* the ICJ teaching while inconsistently replacing, though, the "effective control of military or paramilitary *operations*....", by just the condemnable "*conduct*" (43).

Surely, the 1998 ILC could not assume that either the attenuations of the 1974 commentary or Judge Ago's *Nicaragua* Separate Opinion had brought about an obliteration, by its author's, of Ago's 1971 presentation of Article 8. Those episodes were not two sacred *fatwas* emanating from high priests of the (alleged) customary law of attribution (44). The 1998 ILC had before it (apart from the questionable *Nicaragua* pronouncement) *two different stands by one of the previous Special Rapporteurs*. In 1971 that Rapporteur's formula encompassed two different kinds of hypothesis: (*a*) persons or entities specifically instructed by State organs to carry out a given concrete action or omission possibly triggering international responsibility; (*b*) persons or entities charged — and obviously instructed — to undertake a function, mission or task in the performance of which acts *might* occur triggering international responsibility, the latter hypothesis viewed by Ago as likely to be relatively more frequent than the former. There was no justification for the 1998 Commission to single out (*a*) and leave out (*b*) (45). It was the ILC's job to compare both hypotheses in light of all

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(43) I actually wonder whether the Court's members of 1986 had ever thought of taking a look at Ago's presentation of Article 8 in his Third Report and, for that matter, at least at the ILC 1974 commentary to that provision. Anyway, one is bound to extend to the Commission the charge of "trashing" customary law: a charge that would be justified by its hasty, superficial study of both the original 1971 Ago's Article 8's presentation and the practice subsequent to *Nicaragua*.

(44) The neglect of the latter document's precious data raises doubts about the propriety of the ILC's method in determining customary law comparable — *mutatis* not many *mutandis* — to the ICJ's not infrequent failures in the same respect. True as it is that progressive development (hopefully progressive) is an important part of the ILC's task, it should not be a substitute for strict codification first; and should in any case not precede, but be preceded by, the most accurate determination of the current state — assuming, for the sake of argument, the validity of the normative approach to attribution — of customary law.

(45) It was justified to do so neither by *Nicaragua* nor by the fact that Ago had shown a preference for hypothesis (*a*) — minimizing or totally excluding (*b*) — either in the 1974 commentary or in his separate Opinion.

the available judicial and doctrinal data in the respect of the proper method in the determination of what it rightly or wrongly deemed to be (let alone within the framework of its normative approach) the customary law of attribution (46). As, *hélas*, the 2001 Article 8 and the commentary thereto show, the ILC did even worse. It moved radically away not just from Ago's Third Report's presentation, but from the 1974 ILC commentary as well.

Coming more thoroughly to the cases cited by Crawford in his first Report, in *Zafiro* it could surely not be said that the Chinese crew's misdeeds were "in fact directed and authorized" (even less *Nicaragua* 's "directed or enforced") by the United States. The vessel was operating *on behalf* of the United States navy. In *Stephens* it would not have been credible (and no proof was mentioned) that the Mexican State or any of its subdivisions instructed any one to commit the acts complained of. The persons involved ("auxiliaries" and Valenzuela) were undoubtedly acting, though, *on behalf* of Mexico, but if it was not really a matter of persons operating *in fact — ante literam —* on Ago's "on behalf", they were just statutory organs of the Mexican State (though *de facto*, of course from the standpoint of international law). The *Yeager* case's Komitehs were obviously operating, if not also as *de iure* organs under the inchoate legal order of the Iranian new regime, *on behalf* of the Iranian State: certainly not under any specific *...Nicaragua* instruction, direction or enforcement. The other case mentioned by the Special Rapporteur is *Loizidou*, where the TNRC seemed to have been neither specifically instructed, nor authorized or directed by the Turkish Government, or its military HQ in the area, to interfere with the complainant's property. The TNRC was viewed by the European Human Rights Court to have acted *on behalf* of Turkey, or, more simply and safely (considering the terms of the Convention it applied), *within the scope of Turkey's jurisdiction*. It is perhaps not too daring to ask whether, for the purposes of the Convention, there was so much difference between "under Turkey's jurisdiction" and "on Turkey's

(46) To be sure, Ago's 1971 Article 8 was based upon a case-law equally divided between a general, flexible "on behalf" test and an "instructions" test (namely a restrictively conceived "on behalf" test to be understood, in light of the examples described in the relevant part of the above-quoted Third Report paragraphs, as an "instruction(s)" test). In *Zafiro*, *Stephens* and other cases there was not a shadow of instructions. In the *Sabotage* and abduction cases instructions were obvious. The ILC should not have stopped at the latter. Only by a more proper method — no trace of which is perceptible in the 1998 Summary Records — could the 1998 ILC prefer one or the other of Special Rapporteur and Judge Ago's understanding of his original Article 8.

behalf". Together with *Zafiro*, *Stephens* and *Yeager*, *Loizidou* could even be classified as an instance of application of an "overall control" test: the broadest conceivable flexion of "on behalf".

Had the Special Rapporteur's and the whole ILC's vision not been blurred by the *Nicaragua*'s para. 115's "directed or enforced" together with Ago's emphasized adherence to it, the 1996 and 2001 Article 8 could have taken a better turn than it did at the 1998 session (47).

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(47) Indeed, be as it may of the merits of Ago's "on behalf", that valuable formula had been thrown out of the picture by its superficially narrow interpretation. When Article 8 was taken up for the ... preparation of the second (and, *hélas,* final) reading it would have been impossible to wipe out the blighting restrictive interpretation of "on behalf". James Crawford was bound to find some broadening formula. Unable (or unwilling?) to get rid of the narrow "instructions", he thought, however (rightly), of keeping that test as one of the elements of a triplet within which the broadening factor was entrusted to the alternative "direction or control". Scared, though, by such a daring step (viewed, of course, by the present anti-normativist as a way at least to approximate the ILC attribution régime to the preservation of the judges' and arbitrators' discretionary role in the performance of the (factual) "intellectual operation to bridge the gap"), the Special Rapporteur, followed as one man by the whole Commission's membership [none of whom was presumably aware of paras. 190-191 of Ago's Third Report], added to the said crippling broadening elements the crippling *caveat* "in carrying out the conduct [complained of]".

As noted by SPINEDI, *La responsabilità dello Stato*, cit., pp. 84-85, for the purposes of the problem of private contractors it must be stressed that Ago's Third Report cites, as a hypothesis falling within the scope of Article 8, the case where a State's authorities entrust to private parties (natural or juristic persons) given functions or tasks — for example the task of ensuring a given public service in the field area of transport or postal mail services — and the hypothesis of private associations employed as auxiliaries of police forces and also armed forces, of private drivers of vehicles employed for the transport of troops to the fighting line. Mention is also made of dated instances such as the charging of particular powers to colonial ("à la charte") companies. As Spinedi clearly explains, Ago's original Article 8 (*a*) expressed a very broad, flexible attribution criterion consisting in the simple datum that a person or group of persons (entity) in fact acted on behalf (in French "pour le compte") of the State. Spinedi finds, consequently, that since that formula "lascia[va] all'interprete grande discrezionalità nella individuazione dei casi in cui poteva dirsi che la persona agiva in fatto per conto dello Stato", even the case of so-called private contractors was covered, regardless of the functions the latter were (overtly or covertly) entrusted with.

IV.

A REVIEW OF THE ILC'S AND THE LITERATURE'S THEORETICAL PREMISES

CONTENTS: 17. The origin of the normative theory. — 18. Roberto Ago's 1939 theory. — 19. Ago's 1971 normative construction. — 20. The normative theory's inconsistency with Ago's own premise. — 21. Post-1971 developments of the attribution normative theory.

17. An early formulation of a normative concept of attribution — *rectius*, as it was then called, imputation — can be traced, for the present purposes, to the time when the *rattachement* of human conduct to the State's international person was considered to be founded on the State's internal law. I refer essentially to the views expressed in the literature that preceded Triepel's and Anzilotti's formulation of the dualist theory of the relationship of international law to national law. As the State *per se* was then viewed, essentially, as the juristic person organised by its own municipal law, the logical answer to the question of how the State could act for any international purposes was that it did so through the conduct of the officials, agents or organs possessing such status under the State's municipal law. A few references to that doctrine appear in Ago's 1971 Third Report's (1), the cited authors including Fiore, Calvo, Despagnet, Guerrero, Levin, Oppenheim (1905), Jess, and Anzilotti's early works on State responsibility. These theories are all obviously based upon an implicit or express analogy with public and private corporate bodies of domestic law. Accordingly, the actions or volitions of the State's international person, viewed as a juristic person (*personne morale*), are the actions and volitions of agents or organs qualifying as such under each State's domestic law. Explicit indications to that effect are present in some of the literature referred to in the Third Report. As rightly noted by Ago, those theories fail on the ground of logical inconsistency with both international practice and the lack of juridical continuity between international and domestic law. On the count of practice, they fail in that their adherents are obliged to

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(1) See p. 233 ff., paras. 106 ff., especially paras. 112 ff. and footnotes 195-197.

find artificial and unconvincing manifestations of conformity of attribution with the State's organisation under its domestic law, the law being envisaged as a fact from the standpoint of international law.

On the count of legal theory of the separation between international and domestic law, namely the sound dualist theory persuasively worked out by Triepel and Anzilotti and authoritatively affirmed by the famous PCIJ *dictum* of 1926 and its successor ICJ, once demonstrated that domestic law is only a fact from the viewpoint of international law, one can hardly accept the view that attribution of conduct to a State's international person, for the purposes of its responsibility under international law, can be effected by that person's domestic law as such.

18. It is, in a sense, after his correct rejection of the above described theory of the State's international person as juristic person under its domestic law that Roberto Ago first took up the matter of imputation of conduct (as distinguished from imputation of liability) in his well-known 1939 Hague Academy course on *Le délit international* (2). It is in that course that one can trace the roots of the contemporary, surprisingly successful normative theory of attribution, as rather passively accepted in 1971 in his Third Report and since then stubbornly worked out within the framework of the International Law Commission's work on the law of State responsibility. More precisely, those roots lay in Ago's 1939 axiomatic assertion — apparently unsupported by any jurisprudential data — that a *juridical* attribution of conduct [at the time still called imputation] was the indispensable condition for the imputation of international liability to a "sujet de droit", notably to "les Etats-sujets du droit international".

This juridical concept of imputation applied both to a natural person as well as to a State's international person, the extension of the axiom to natural persons being manifest in Ago's Hague course, where he states "[q]ue le substrat matériel du sujet soit ou non représenté par une personne physique, cela ne change pas la nature juridique du sujet ni son caractère essentiel de destinataire de jugements juridiques, donc de sujet possible de l'imputation juridique d'un fait illicite" (3).

A difference between the two kinds of "sujets" is, however, stressed by Ago, where he specifies that the "logical" juridical operation of imputation "ne présente normalement aucune difficulté grave si le sujet [...] est une personne physique [...] la règle effectuant

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(2) *Le délit international*, *Recueil des cours*, vol. 68, 1939-I, p. 419 ff.
(3) *Le délit*, cit., p. 459.

l'imputation du tort se fonde sur une donnée de fait dont la connaissance ne présente pas de difficulté du point de vue juridique, à savoir la donnée de fait que le sujet [en question] *est matériellement l'auteur de la conduite* [illicite]" (4) (emphasis added). However, "[l]es choses se compliquent — Ago states — si le sujet capable d'imputation est une personne juridique. Et c'est ce qui arrive *précisément* dans le droit international, où les sujets sont constitués *précisément* par les plus typiques et les plus parfaites des personnes juridiques, par les personnes juridiques par excellence, c'est-à-dire par les Etats" (emphasis added) (5). The shortcomings of the 1939 presentation of the theory for natural and juristic persons are better dealt with separately in the following paragraph (6).

With regard to *personnes physiques*/natural persons, Ago's language leaves no room for doubt about what seems to me the absolute wantonness of his alleged "logical" operation by legal rules "bridging the gap", to use Starke's expression, between the conduct to be imputed, on the one hand, and the person itself, on the other hand, for liability to be imputed to the latter. Ago's words are crystal clear when he states that "l'imputation est une donnée de fait", "pas de difficultés du point de vue juridique", "le sujet est matériellement l'auteur de la conduite [illicite]".

Authors of the "bridging of the gap" are in the present writer's view the teachers in class-room cases and the judges, arbitrators or commissioners sitting for judgment. It is for them to collect the facts submitted by the parties or obtained by interrogation; and no rules, except those governing the panel's impartiality, the burden of proof and the equality of the parties in the proceedings, come into play before the liability norms. The imputation process is clearly a preliminary *quaestio facti* (*secundum alligata et probata*) to ascertain whether the *de qua* natural person is materially the author of the juridically questionable conduct giving rise to its liability under the conditions set by the primary rule. It would be simply absurd to imagine the role of a legal

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(4) *Ibid.*

(5) *Ibid.*

(6) Dealing separately is indispensable because the claim that imputation of conduct by legal rules to natural persons plays any role with regard to the natural person's delictual liability is clearly devoid of any logical foundation. The similar claim for the case of juristic persons' delicts is of course unquestionable as a general proposition — namely for *all legal persons* of domestic law — the domestic law legal personality of the State itself included; it is instead highly questionable for the States' international persons, the latter being, by Ago himself's admission, merely factual entities perfectly similar, *mutatis mutandis* to natural persons.

rule "bridging the gap" between the assassin's weapon, if not his arm, and the main part of the actor's body.

Although it requires a longer discourse, the same factual conclusion emerges from the study of Ago's reasoning on the imputation of conduct to the kind of persons of direct interest for our purpose: the persons named by Ago "les Etats-sujets du droit international" that I prefer immodestly to name, more *précisément*, the States' international persons. Although some difficulty derives here from his questionable concept of juristic persons, Ago himself condemns his attempt to construct a normative concept of attribution. One must just consider the difference between juristic persons, on the one hand, and collective entities not possessing the juristic persons' *precise* features, on the other hand.

Of course, in general one fully shares Ago's qualification of *States* as juridical persons under domestic law. No doubt *States under their internal law* are juridical persons, *personnes morales*. Within that law, they even are, to use Ago's emphasis, "personnes juridiques *par excellence*", in comparison, one assumes, with lower-ranking public and private juristic persons under that same law. Such persons being naturally unable to act except through the conduct of natural persons vested by domestic law with the quality of organs or representatives of the State, and acting normally within the sphere of their respective legal competencies.

It was actually on that precise basis that an authoritative portion of the scholarship, straddling the nineteenth and twentieth centuries' divide, attempted to resolve the problem of imputation of human conduct to States for the purposes of international responsibility. It was the period of the pre-Triepelian concept of international law, where the domestic law of States was viewed, implicitly or explicitly, as "derived" from, or otherwise systematically dependent on, international law as a higher ranking law. Within the framework of that doctrine — rightly to be rejected after Triepel's and Anzilotti's construction of the dualist concept of the relationship of domestic law with international law — it was perfectly natural to envisage a juridical imputation to States of the conduct of their officials as determined by their domestic law conceived as a subordinate legal system, just as the by-laws and statutes of lower ranking (non "excellent") juristic persons' conduct was attributed on the basis of the rules of such by-laws or statutes. Despite the few essential exceptions conceived by those scholars in order to save at least in part the independence of international law in the imputation of responsibility, the theory is quite rightly set aside by Ago, in his Third

Report as not in conformity with the said independence (7). However, the doctrine in question seemed egregiously to conform to Ago's concept of States as juristic persons: "par excellence".

An entirely different matter, however, was the extension — in the consolidated post-Triepelian era — 1939 — when Ago first addressed the problem of imputation — to what he called "*les Etats-sujets du droit international*" and I call (from 1951 onwards) the "States' international persons".

As Ago himself clearly shows, his "Etats-sujets", precipitously qualified by him as "personnes juridiques par excellence", are no such thing. They lack, precisely, as Ago rightly demonstrates, that very element of an internationally "derived" or otherwise dependent order that is the essential feature of *personnes morales* and the equally essential distinction of such entities from natural persons. This emerges firstly from Ago's very firm rejection of Kelsen's view that juristic persons are endowed (as Chief Justice Marshall thought long before) or coincide with a legal order; secondly, from Ago's equally firm adherence to Triepel's and Anzilotti's view of the separation of domestic law from the law of nations: more specifically from Ago's (as well as the present writer's) adherence to the Permanent Court's (PCIJ) and the present ICJ's doctrine, according to which national legal systems are neither parts nor dependencies of international law: they are, from the latter's standpoint, and for the Court which is its organ, just facts, as well as national judgments and administrative acts. If the obvious truth had not been perceived by the doctrine considered in the preceding paragraph, it was due, at least in part, to the absence of both Triepel's fundamental book and an international tribunal like the PCIJ, composed of first class international lawyers.

It was thus in conformity with his own Triepelian construction that Ago found himself unable to resort to the domestic law of States (as by-laws or similar dependencies of the law of nations) for the juridical regulation of imputation of individuals' conduct to the States' international persons. Resort became thus for Ago inevitable — at least in principle — to international law. Indeed, according to Ago's 1939 *Le délit*, "[q]u'une imputation de la part du droit international soit la seule dont on puisse logiquement parler quand le fait juridique à imputer est un fait juridique international, en particulier un tort international, paraît être une vérité d'une telle évidence qu'il devrait être inutile d'y insister particulièrement. L'imputation, comme toute opération ju-

(7) AGO, *Third Report*, cit., p. 219, para. 60, and p. 234 f., paras. 111-112.

ridique, ne peut avoir lieu dans un ordre juridique donné que par l'effet des règles du même ordre" (8) .

Considering that state of affairs, and considering that it would be not to international law that one could assign the role of organizing States (for the purposes of international responsibility), imputation of conduct to the State for those purposes can and must only be effected, in Ago's view, on the basis of a "*présupposition que l'ordre international fait de l'organisation interne de l'Etat*" (9). Such "présupposition", however, does not purport, according to him, that international law "subordonne son imputation d'un fait juridique à l'Etat à une imputation correspondante du droit étatique" (10). Ago continues in fact:

> "Il faut se rendre un compte exact du sens de cette présupposition que le droit international fait de l'organisation interne de l'Etat. On a parlé à ce propos d'un renvoi que le droit international ferait aux règles du droit étatique: mais le terme, s'il n'est pas inexact en lui-même, peut néanmoins prêter à équivoque. En effet, il ne s'agit ni d'un renvoi signifiant que le droit des gens subordonne son imputation d'un fait juridique à l'Etat à une imputation correspondante du droit étatique ni davantage d'un renvoi aux fins de déterminer le contenu concret de la règle internationale, cette dernière établissant elle-même l'organisation de l'Etat-sujet du droit international, mais en se servant totalement ou partiellement des règles qui établissent cette organisation dans le droit interne".

Significantly, the passage continues as follows:

> "l'organisation interne de l'Etat et la qualité d'organe qu'y revêtent certaines personnes, ne deviennent pas pour le droit international une organisation et une qualité dotées de valeur juridique. Elles ne sont que des données de fait, des prémisses matérielles que le droit des gens utilise comme points de repère pour les jugements juridiques qu'il veut effectuer. La norme internationale relative au délit doit se comprendre comme imputant un fait illicite international à l'Etat, en présence d'une certaine conduite d'un organe de cet Etat. Pour interpréter cette norme, pour savoir la signification de l'expression qui vient d'être employée: 'un organe de cet Etat', il faut s'adresser nécessairement à l'organisation

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(8) AGO, *Le délit*, cit., p. 461, quoting KELSEN, *Unrecht und Unrechtsfolge im Völkerrecht*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1932, p. 500 ff., and PERASSI, *Lezioni di diritto internazionale*[4], vol. I, Rome, 1939, p. 116 ff.

(9) *Ibid*., p. 463.

(10) "L'ordre juridique extérieur, dans le sein duquel la personne juridique [de l'Etat] opère, pour lequel elle constitue le sujet, en l'espèce l'ordre international, doit nécessairement présupposer cette organisation intérieure de la personne juridique, cette qualité d'organe attribuée à certaines personnes physiques. Il n'aurait ni l'intérêt ni la possibilité de faire autrement", *ibid*, p. 463.

> interne et au droit de l'Etat, de même qu'il faut recourir à l'organisation interne et au droit de l'Eglise pour savoir ce que signifie l'expression 'cardinaux', que l'on peut retrouver, par exemple, dans une règle du droit public italien ou francais.[...] [D]u point de vue de l'ordre international, [la qualité juridique] d'organe n'est considérée que comme une condition de fait nécessaire pour pouvoir examiner sa conduite et l'apprécier comme une conduite juridique de l'Etat" (11).

In conclusion, the condition for imputation seems to be — contrary to the normative theory's assumption — only a factual one. The conducts allegedly to be attributed to the State by the supposed international rule's *"logical" operation,* are simply conducts of persons factually belonging — permanently or occasionally — to the State's organic structure. This conclusion is confirmed by Ago's further 1939 developments on the questions: (*a*) *which* State organs may hold a conduct "*susceptible d'être qualifiée par le droit international de fait illicite*"; and, (*b*), whether *any conducts* of any such organs would be attributable as an international delict.

The first point in Ago's 1939 *Le délit international* was his adhesion to the juristic persons' (*personnes morales*) concept of "L'Etat-sujet du droit international", the States being precisely, in his view, "les plus typiques et les plus parfaites des personnes juridiques ... *les personnes juridiques par excellence*". And the cited author conceiving the *personne morale* — as it was ambiguously viewed at that time in the continental European literature — not just like a juridical creature (as, for instance, in Savigny's classical "fiction" theory as well as in Chief Justice Marshall's celebrated definition) but as a factual, corporeal entity essentially consisting of, or including, the underlying sociological entity generally labelled "substratum", *rectius*, that material aggregation of individual members, beneficiaries, agents, financial assets etc., that is the *raison d'être* of the incorporeal juridical creature's. The State's international person (Ago's "l'Etat-sujet de droit international") consisted of a mixture of the rules of its statute or legal order with a substratum including the nation, its organization, its territory, its assets (12). Hence, *firstly*, the idea that the States' international persons were viewed by Ago, as by many, like *legal* and *factual* entities *at the same time*.

Secondly, within *Le délit*, the notion that the States' international persons could only act through the conduct of *legally* determinable

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(11) *Ibid.*, pp. 463-465.

(12) What Ago refers to at p. 460 of *Le délit*, cit., as "le substrat matériel du sujet".

individuals coexists only with difficulty with Ago's firm rejection of Kelsen's notion that the national legal systems were "derived" from international law (13), as well as with the opposite notion — not less firmly held by Ago (not to mention myself) — that the said international persons' legal systems were *factual* aggregations of *factual* rules from the viewpoint of international law, as authoritatively maintained by Triepel, Anzilotti, the Permanent Court of International Justice (14) and, of course, my teacher Gaetano Morelli and Ago himself.

Thirdly, since the municipal legal systems — rightly viewed as *facts* from the standpoint of international law — could not appropriately provide for a *juridical* determination of the human conducts' attribution to the States' international persons, it inevitably remained, *under Ago's normative theory's assumption*, for international law to make that determination, either by *renvoi* to the (factually conceived) municipal law, or on the basis of effectiveness, namely of the factual connection between the acting natural person — or, more precisely, that person's conduct — and the State's international person. In any case, though, given the normative theory's assumption, the attribution of human conducts to the States' international persons was determined on the ground of international legal rules.

How can one say that an entity is a juristic person under a legal order, if the entity in question is not endowed with a legal system within the legal order that personifies it (15)? How can one say, on the one hand, that the problem of imputation is the same for juristic persons and natural persons, and, on the other hand, that "la règle effectuant l'imputation du tort se fonde sur une donnée de fait dont la connaissance ne présente aucune difficulté du point de vue juridique, à savoir la donnée de fait que le sujet auquel on veut imputer le tort est matériellement l'auteur de la conduite qui contraste avec une obligation juridique du sujet en question. Mais les choses se compliquent sensiblement si le sujet [...] est une personne juridique. Et c'est ce qui arrive précisément dans le droit international, où les sujets sont constitués précisément par les plus typiques et les plus parfaites des personnes juridiques, par les personnes juridiques par excellence, c'est

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(13) Namely subordinate to international law in the way member States' legal orders are "derived" from international law and subordinate thereto; just like the legal orders of any juristic person (*personne morale*) are partial, subordinate legal systems within the "total" legal system of a unitary or federal State.

(14) See *supra*, p. 79, note 11.

(15) *Le délit*, cit., p. 460 f.

à dire par les Etats" (16)? And how can one say, on the one hand, that "[u]ne personne juridique, c'est un sujet de droit [c'est-à-dire une entité personnifiée] à laquelle ne correspond pas dans la réalité matérielle, la présence d'une personne physique", and, on the other hand, "[q]ue le substrat matériel du sujet soit ou non représenté par une personne physique, cela ne change pas la nature juridique du sujet ni son caractère essentiel de destinataire de jugements juridiques, donc de sujet passible de l'imputation d'un fait illicite" (17)?

19. When Roberto Ago worked at his 1971 Third Report, there were available a number of writings that apparently gave him food for thought with regard to the nature of the States' international persons and of their organisation from the standpoint of international law. Accurate a reader as he was, he did note that one scholar observed "que les règles juridiques internationales n'ont rien à faire avec la détermination de l'organisation de l'Etat aux fins du droit international" (18), and that another stressed that "l'organisation de fait du sujet devrait [...] prévaloir sur son organisation juridique [interne]" (19). Another scholar went far enough to contest the identity of the State's international person with the State's *personne morale* of municipal law (20).

Developments like these may well explain why Roberto Ago's 1971 views about the nature of the States' international persons had evolved since 1939. A keen observer actually noted that Ago's position with regard to the extension of the juristic person's concept to the State's international person had become, by 1971, closer to the present writer's factual State concept of 1951 than to Ago's position of 1939 (21). The relevant paragraphs of the Third Report do reveal significant afterthoughts from the 1939 position. Acknowledging the valuable contributions made to the subject by the above cited authors, Ago also approved expressly what he calls the present writer's "cogent critique" of

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(16) *Ibid.*, p. 459.

(17) *Ibid.*, pp. 459-460.

(18) Biscottini, quoted in AGO, *Troisième rapport sur la responsabilité des Etats*, in *Annuaire de la Commission du droit int.*, 1971, vol. II, deuxième partie, p. 248, para. 113, note 200.

(19) Morelli, quoted *ibid.*, note 202. In the same note Ago refers also to Bellini.

(20) ARANGIO-RUIZ, *Gli enti soggetti dell'ordinamento internazionale*, Milano, 1950.

(21) PALMISANO, *Colpa dell'organo e colpa dello Stato nella responsabilità internazionale: spunti critici di teoria e prassi*, *Comunicazioni e studi*, vol. XIX-XX, 1992, Milano, p. 625 ff.

the idea that the organization of the States' international persons was established by international law (22). Implicitly, in the Third Report, "les Etats-sujets" of international law are no more "les plus typiques et les plus parfaites des personnes juridiques [...] les personnes juridiques par excellence", although no explanation is given of the supervening *non excellence* of the "Etats-sujets". On the latter's nature, that Report states that "[l']expression 'personne morale' n'est pas employée ici au sens technique strict du terme, mais uniquement par opposition à celle de 'personne physique', pour indiquer une *entité collective* ne pouvant agir qu'en se servant d'individus humains. Au sens technique strict du terme, l'Etat *n'est pas une personne morale du droit international*, mais uniquement du droit interne. Voir, à ce sujet — et abstraction faite de la description que ces auteurs donnent, respectivement, de l'Etat en tant qu'entité sujet du droit international —, Giuliano, *La comunità internazionale e il diritto*, Padoue, 1950, p. 241 ff., et surtout Arangio-Ruiz, *Gli enti*, cit., p. 26 ff., p. 95 ff., p. 378 et suiv." (23).

Moving, however, to imputation of conduct for the purposes of international responsibility, Ago reiterates, citing a number of authorities in support (but no specific arbitral or judicial decisions), the 1939 axiom that the "imputation" of conduct of human beings to the State's international person ("les Etats-sujets") can only be effected by law, namely, by international law: a crucial point, the latter, on which Ago emphatically evokes, *inter alia*, Anzilotti's statement that "juridical imputation is clearly distinct [...] from 'rapporto di causalità'", and that "[i]l n'y a pas d'activités de l'Etat qui puissent se dire 'siennes' du point de vue d'une causalité naturelle et non pas d'un rattachement juridique" (24). Ago seems thus to go back to his 1939 view that "les Etats-sujets" are, contrary to the above quoted passage, juristic persons unable to act except through *juridically attributed* human conduct. Anyway, all depends on what one means by the term "juristic person":

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(22) AGO, *Troisième rapport*, cit., p. 249, para. 117, note 204.

(23) *Ibid.*, p. 228, para. 57, note 75.

(24) *Ibid.*, p. 229, para. 58, note 78. Considering that Ago addressed such remarks to the State's international person — and not to the State's person in municipal law — it seems clear that he has maintained, at least up to the time of his Third Report, his 1939 idea that the State's international person is a juristic person (or *personne morale*) whose behaviour for international legal purposes depended upon the attribution (to the person) of actions or omissions of individuals or groups determined, precisely, by international law.

a term about which the Third Report seems to be somewhat confusing (25).

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(25) Ago's discourse appears here too ambiguous on the concept of *personnes morales*. More than just difficult, it seems indeed impossible to accept the notion that there are three kinds of juristic persons: juristic person in an ordinary sense, juristic person in a technical sense, and juristic person in a strict technical sense. Even more difficult is to accept the idea that the State's international person, while not qualifying as a juristic *person of international law*, is nevertheless a factual *personne morale* or a factual *entité collective*, at the same time only able to act through human beings *determined by international law*. If Mario Giuliano knew about such distinctions, it would have been easy for him to illustrate them; and since Giuliano had not done so, it would have been desirable that they be illustrated at the time, in the seventies, when Roberto Ago proposed to the ILC to base upon them such a crucial part of its work as the attribution to the State of single individuals' or groups' behaviour.

The truth seems to be that there is no such thing as a distinction between a concept of *personne juridique tout court* and *personne juridique* "au sens technique strict du terme" as Ago seems to assume. The present writer's guess is that Ago has absentmindedly picked-up Giuliano's statement that the State is not quite, for international law, "persona giuridica in senso tecnico" as an admission that it was a *persona giuridica* in some other, non-technical sense. Giuliano, though, seems not to have discussed the nature of juristic persons to any length or depth. As I understand that author, he simply asserted that the State is not a *persona giuridica* in a ... proper sense, namely, that it was not a *persona giuridica*, without taking the trouble to specify the juristic person's concept, far less to suggest a distinction between juristic persons in a technical sense and juristic persons in any other (including "non-technical") sense. The present writer, for his part, did study to some depth the nature and concept of juristic persons without finding any distinction between juristic person in a technical and juristic person in a non-technical sense: and after studying in detail the nature of the State's international person in the light of that concept, concluded, and maintains to this day the idea, that the State's international person is not a juristic person. To say, as Ago claimed, that the State's international person is a juristic person in a non-technical sense is, with great respect, nonsense.

By his quoted discourse Ago enhances the ambiguity of his position. The only way to describe a juristic person as opposed to a natural (or "physical") person is to recognize that it is a juridical, not a physical or natural entity, namely a mere creation of the law as distinguished from its so-called "substratum". As recently reiterated by the present writer, Ago obviously shared the incorrect notion of juristic persons which prevailed in his time (in both 1939 and 1969) among most, especially Italian, international legal scholars (under the rightly authoritative influence of Dionisio Anzilotti).

Ago's position's ambiguity is confirmed, in the same cited 1971 *Troisième rapport* (at p. 228, para. 57, note 76), where he seems — quite inconsistently — to share Marinoni's view that "Nella realtà fisica non v'è un ente Stato ...ma vi sono soltanto azioni, voleri di individui, che l'ordine giuridico può far valere per un subbietto di diritti diverso da quella persona fisica che li ha posti in essere" (MARINONI, *La responsabilità degli Stati per gli atti dei loro rappresentanti secondo il diritto internazionale*, Roma, 1913, p. 33 ff.). Marinoni was confusing here, within one and the same notion, the State of national law and the State's international person, clearly on the basis of that *Zwei Seiten Theorie* that prevailed at his time (and still prevails in Italy and elsewhere), thanks also to Ago, and in spite of the present writer's ignored or misunderstood criticism of both the current concept of juristic person and the distinction of the State's international person from the State of national law.

Regarding a factual collective entity, which cannot be equated to a juristic or moral person in any plausible sense, the attribution to such an ...animal of the actions

Be that as it may, in respect of our contention that the attribution of a fact to a State's international person — which is actually, in our view, the appurtenance of the fact to the person — is a merely factual operation, he states that "ce que Arangio-Ruiz [...] appelle imputation matérielle-psychologique d'un fait à son auteur [I was still using at that time the improper concept of imputation] n'est pas suffisant pour expliquer sur quelle base la règle du droit international prend en considération le comportement matériel d'un être humain donné pour attribuer une responsabilité à l'Etat comme conséquence juridique de ce comportement, tandis qu'elle n'en fait pas autant par rapport à d'autres comportements matériels du même être humain" ([26]).

To the quoted remark about my "material-psychological imputation" it must be replied that the distinction between those two hypotheses is operated by the primary rule. Ago's contention that the attribution is effected by legal rules is inconsistent, with respect, with Ago's own premises (fully shared by me) that: (*a*) the State's national law is just a fact from the standpoint of international law; (*b*) international law does not organize the State, namely does not qualify given human beings as the State's organs. In such a situation one cannot seriously escape the conclusion that the attribution of any human conduct to a State can only be a factual operation based upon facts, the only rules conceivably involved being the primary rule qualifying the State's conduct as unlawful (and, of course, the Tribunal's rules relating to burden of proof and other procedural matters).

The inconsistency of the argument the eminent master opposes to my dated position is only emphasized by his consideration that: "[m]oreover when we speak of the legal attribution of [...] conduct [...] to the State as a subject of international law [*rectius*: to the State's international person], we do not maintain that the legal attribution *is the specific effect of rules having that particular purpose*. The *fact* of

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or omissions of human beings (an operation that would be more appropriately described as the *determination of the appurtenance* of such actions or omissions to the State) can only be merely a matter of *fact*, it being understood in any case that for our part, a discourse in terms of "imputation" or attribution of individual conduct is incorrect (inappropriate) also for juristic persons or *personnes morales* themselves . The law (international as well as national) imputes or attributes neither acts or omissions, nor, for that matter, natural *facts*. It only imputes or attributes legal consequences to the relevant person or persons. Regarding in particular Ago's contention that a factual collective entity would not be capable of behaviour except through human beings *determined by the law*, the present writer confines himself to noting that any factual collective body, such as a mafia, is undoubtedly "*physiquement capable*" of behavior through the human beings factually belonging to it.

([26]) AGO, *Troisième rapport*, cit., p. 229, para. 58, note 78.

considering a material act of an individual as an act of the State is only *one of the conditions of the operating of the rule of international law* which, *under certain circumstances*, *attributes international responsibility* to the State" (27). This precision tells enough in contrast to the normative theory and in support of the factual concept of the process. I submit that here the Third Report's author is begging the question. Within the same context, Ago makes an important admission when he states that "[l]orsqu'on parle, d'ailleurs, de l'attribution par le droit de certains faits individuels à l'Etat sujet de droit international, on n'entend pas dire que ce rattachement soit *l'effet spécifique de règles ayant une telle destination* [I would say *fonction*]. La *considération* du fait matériel d'un individu comme fait de l'Etat *est simplement une des prémisses en vertu desquelles opère la règle de droit international qui, dans certaines conditions, attribue à l'Etat une responsabilité internationale* " (28).

One wonders in what sense Ago's "prémisse" must necessarily be the object (or the effect) of an international (secondary) norm rather than the factual product of the judge's intellect's factual "rattachement" (or Starke's "bridging"). The Report relies unduly upon a distinction of one norm from another. It matters little, if anything, for the issue of the normative or factual nature of attribution — as a supposedly distinct or distinguishable part of the liability process — whether the alleged attributive (secondary) function is provided for by a distinct article of an ILC code or just a ("premissive") paragraph or phrase in the norm attributing liability (29).

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(27) In the subsequent part of the same footnote 78 to para. 58 (p. 218 of the English version *Third Report.*, cit.). Emphasis added.

(28) Final part of note 78 of *Troisième rapport*, cit., p. 229, para. 58. Emphasis added.

(29) The weakness of Ago's position is not significantly reduced by that author's claim (in note 77, p. 229) to find support in Starke's *dictum* [allegedly as well as in Anzilotti's previously quoted *dictum*] that "The imputation is thus the result of the intellectual operation necessary to bridge the gap between the delinquencies of the organ or official and the attribution of breach and liability to the State (STARKE, *An Introduction to International Law*[4], London, 1958, p. 105 ff.)"; but the reported *dictum* is not, *per se*, quite the same as Anzilotti's. The latter clearly stresses a normative concept of attribution, while Starke's "*intellectual operation necessary to bridge the gap* " does not necessarily imply the application of legal rules; and unlike the "*breach*" and the "*liability*", both surely matters of international law, the organ's or official's "*delinquencies*" involve international law only after the bridging operation — consisting, in a non-normativist's view, in an intellectual collecting, assembling and confecting or pasting together a number of facts — ultimately proves the involvement of the State's body. The least that can be said is that Starke's definition *per se* could help both the factual as well as the normative concept of attribution. Regarding the rest of Starke's discourse (p. 105 ff.), it does not seem to be so decisively in favour of a

Focusing on Chapter II, *Le "fait de l'Etat" selon le droit international* (30), the Report condenses the treatment of "les aspects généraux du problème" into three maxims, the first emphasizing again that attribution "est basée sur des données juridiques et non pas sur la reconnaissance d'un lien de causalité naturelle", the second declaring that attribution "est faite à l'Etat en sa qualité de personne du droit des gens" and not to the State as a legal order of national law, and the third being that attribution "ne peut avoir lieu que sur la base du droit international lui-même" (31). The Report then sums up what the author sees as three "conclusions essentielles", namely that (32): (i) the assertion that international law attributes to the State the conduct of its agents or organs does not mean "que les personnes dont il s'agit *acquièrent la qualité juridique d'organes de l'Etat selon le droit international*", such persons possessing the quality of organs *only in the State's internal law* (33); (ii) international law is "entièrement libre, dans sa prise en considération, de la situation existant dans l'ordre juridique interne. L'autonomie de l'attribution [...] sur le plan du droit international par rapport à l'attribution sur le plan du droit national est nette et totale" (34); (iii) "l'indépendance de cette détermination [du droit international] au regard de celle que peut faire le droit national" (35).

Immediately after the latter third "conclusion", Special Rapporteur Ago explains that "le but des longs raisonnements [not inductions!] présentés dans ces considérations liminaires et de l'examen détaillé qu'on y a fait des différentes conceptions en la matière a été, comme on

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normativist view. Of course, the normative concept appears inevitably in the 1930 codification language quoted by Starke; but Starke's own *exposé* uses a language where attribution (*rectius*, for him, imputation) appears to be absorbed into liability more than evidenced as a distinct juridical issue. As a scholar of empirical tendency, Starke does not seem to pay much attention to the conceptualization of the matter.

(30) *Troisième rapport*, cit., p. 245 ff. (*Third Report*, cit., p. 233 ff.), para. 106 ff.

(31) *Ibid.*, para. 106.

(32) *Ibid.*, paras. 107-122.

(33) *Ibid.*, para. 119. This situation would not be altered in the case where given State organs exist in compliance with an international obligation. On the independence of international law (on which AGO, *Third Report*, cit., p. 262, para. 187), see CONDORELLI, *L'imputation*, cit., pp. 55-56 with relevant notes of comparison with Ago. In those notes Condorelli partly rightly contests Ago's idea of "imputation [...] effectuée de façon autonome d'après le droit international".

(34) *Troisième rapport*, cit., p. 250, para. 120. Note 208 adds that the distinction is so clear that some scholars (as shown at pp. 247-248, para. 113, of the same *Report*) put forward the idea that international law "déterminerait lui-même l'organisation de l'Etat en tant que sujet du droit international" and "il n'y a là aucune intention du droit international d'insérer dans l'appareil étatique des 'organes' que l'Etat lui-même n'a pas prévus comme tels" (*ibid.*, same para. 120, same page).

(35) *Ibid.*, para. 121.

l'a dit au début, de déblayer la voie à l'examen concret des questions qui forment l'objet de ce chapitre [II — *Le "fait de l'Etat" selon le droit international*]. La détermination à laquelle il nous incombe de procéder peut — nous en sommes sûrs maintenant — faire *entièrement abstraction des préoccupations théoriques* qui ont retenu l'attention de tant de juristes. Elle doit se baser uniquement sur la *recherche des réalités* de la vie [...] internationale, de ce qui ressort de l'examen de la pratique des Etats et de la jurisprudence internationale. Ce qu'il faut avoir en vue, c'est uniquement la tâche de retrouver quels sont les comportements que le droit international attribue réellement à l'Etat qui en est le sujet non pas ceux qu'il devrait lui attribuer en vertu de telle ou telle conception abstraite" (36).

20. From the *ensemble* of the above premises — all manifestly deduced from prevailing doctrinal theorems and Ago's own starting corollaries — it follows that Ago's normative theory of attribution was utterly inconsistent with Ago himself's theoretical assumptions. Firstly, no support to the theory was offered by its author from any jurisprudential (or States' practice) evidence. He fails to show that judges, arbitrators or commissioners proceeded to, or denied, attributions in the belief, implied or express, that in so doing they applied international legal rules setting forth the relevant attribution tests or standards, except, of course, for the rules governing the tribunal's or commission's procedure. They obviously treated attribution on the basis of the factual connection of the actors [*rectius*: the conduct] with the State's international person. Secondly, the normative theory appears to be untenable for its manifest inconsistency with the theorems upon which Ago bases it, particularly in view of: (*a*) Ago's (correct) dualist assumption postulating the factuality of the municipal legal system, including of that system's rules relating to the State's organization from the standpoint of international law; (*b*) Ago's (correct) assertion that the State's international person's organization is not created by international law even where given organs of a State have been set up or modified in compliance with an obligation deriving from international law; (*c*) Ago's (correct) admission of the non-identity of the State's international person with the State's *personne morale* of national law.

It must be added that the Third Report weakens the normative theory by the abandonment of "les Etats-sujets' excellency", not to

(36) *Ibid.*, same para. 121.

mention other inconsistencies with regard to the notion of juristic persons in general.

It seems inevitable to conclude that the essence of the normative theory of attribution, as presented by Ago in 1971 to the ILC and supinely accepted by the latter, brings about a confusion of the factual operation of attribution of conduct, namely the intellectual operation bridging the gap between human conduct and the State for the purposes of international responsibility, with the juridical operation, consisting in the consequential attribution of responsibility to the State. The essential causes of the confusion are the inaccurate and arbitrary interpretation in legal terms of the factual intellectual operation carried out, prior to 1971, by a host of arbitral tribunals and conciliation commissions, as well as the erroneous and inconsistent application, to the former operation, of the proper theory of the relationship of international law with domestic law. We shall deal with the latter matter after analysing the doctrinal developments undergone by the normative theory of attribution in the legal literature following Ago's original construction.

The negative consequences of such a confusion — a confusion frequently occurring also in the relevant literature — are perceptible not only in the Articles the ILC has been working out since the 1970s, including the Articles finally adopted together with commentaries in 2001, but also in the following judicial and arbitral practice as in the literature on State responsibility.

Surely, the essence of the reference to internal law, in the 1971-1996 (Ago's) Article 5 and in the 2001 ILC Article 4 is a very simple one from the standpoint of an inductive, theoretically unprejudiced approach to the attribution process. From that standpoint — that of a judge or arbitrator called to decide about the attributability of any actor(s) conduct to an allegedly respondent State — a reference to the latter's internal law in order to see whether the acting persons or entity enjoy organ status is naturally, if attributability is contested, the very first step to take. If internal law is found to grant organ status, it is obvious, as confirmed by the otherwise problematic para. 11 of the Article 4's commentary, that the internal law test is "decisive" (37). Although not inconceivable, any attempt on the part of a respondent

(37) It is worth stressing, at this point, that the *datum* represented by organ status in internal law — obviously a juridical one within *that law* — is acknowledged by international law, according to Ago's correct opinion (*Third Report*, cit., pp. 237-238, paras. 116-119) — and the present writer's as well — as a factual, not a legal, "presupposto" (SPINEDI, *La responsabilità dello Stato*, cit., p. 18).

State to modify its law *ad hoc* in order to evade liability would obviously fail as occurring *ex post facto* (38). Considering, however, that organ status is neither the only, nor exclusive condition, the State being not any less responsible, in given circumstances, for conduct of persons lacking organ status under its law, it would be incorrect (even if it was deemed to be correct by outdated practices or doctrines) to say that the only attributable conduct is that of persons legally vested with organ status (under municipal law).

There are, indeed, hypotheses where the conduct of persons or entities lacking legal organ status, or, having that status, but acting *ultra vires*, is attributed just the same. A number of such hypotheses are actually contemplated by other provisions of the ILC Chapter II's Articles, the most important being Article 8. It is therefore clear that "organ status" in the respondent State's internal law is not the only possibility. There are hypotheses where the lack of organ status — as well as the lack of competence — is totally irrelevant for the purposes of attribution. If, however, such is the case, as fully admitted by the ILC as well as by the arbitral and judicial decisions, organ status in internal law is not a *sine qua non* condition of attribution.

It follows that, although the existence of organ status under internal law is unquestionably an important *indicium* (piece of evidence) for the purposes of attribution of an actor's conduct to the State, it is not the exclusive test. This is abundantly proved by the fact that under ILC Articles other than Article 4, the respondent State's internal law plays no role for the purposes of attribution, the decisive element for the operation being a merely factual link between the acting person or entity and the State.

More precisely, the factual link to be sought, for the purposes of attribution, is the factual link between the actor's or actors' action or omission and the State: a point to be dealt with further on. It will be shown there that the essential "rattachement" is not so much between the actor(s) and the State, but between the fact and the State, the person or entity being just a material instrument.

Coming to the possible role of international law, Ago has authoritatively and lucidly stressed (in perfect adherence with the above-mentioned arbitral and judicial decisions and literature), first in *Le délit international* (1939), and again in his rightly celebrated *Third Report* (1971), that international law, although independent from national law,

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(38) PELLET seems to evoke such a hypothesis (see *Yearbook of the Int. Law Commission*, 1998, vol. I, p. 232, para. 30).

has no role in directly organizing States or their structures. Even where international law concerns itself with a State's creation or organization, even where it goes so far as to oblige one or more States to create a new State, the contemplated State will not exist as a new State as long as it has not come into factual existence as such for international law. The same must be said where international law binds a State to create, modify or abolish one of its organs, any alteration of the State's structure being the effect not of the international rule or obligation but of the legislative, constitutional or administrative action of the competent domestic law organs as factually acknowledged (but no more than passively acknowledged) by international law.

Such being the situation — *pace* James Crawford's learned volumes on "The creation of States in international law" (39) — international law, while naturally able to impute responsibility to States' international persons for their internationally wrongful conduct, has no role to play — contrary to the Professor Simma's assertion in that sense in the course of his presentation of the 1998 ILC Drafting Committee Report (40) about the "supplementary role" theory — with regard to the attribution of the actor(s)' conduct: except, of course, for the procedural regulation of the judicial or arbitral process through which international tribunals are called, in case of dispute, to determine whether the conduct complained of is attributable to the allegedly respondent State. To make that determination, international tribunals (or, for that matter, negotiating States themselves) are not bound by any substantive rule of a general nature. In other words, attribution of conduct to a State before an international tribunal is the role of the judge. It is not, as the 1998 Drafting Committee Chairman, Simma, seemed to believe, a role of international law. Attribution of liability, of course, is another matter.

To complete this analysis, the passivity of international law with regard to the organization of States is not altered in the least whenever it is confronted with the question of the attribution to the State of the conduct of the State's communal, provincial, cantonal, regional or even

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(39) CRAWFORD, *The Creation of States in International Law*, Oxford, 1st ed. 1979, 2nd ed. 2006. It should incidentally be noted that Crawford concedes a lot to dualism (although his books are obviously inspired by a monistic conception, national law deriving for him from international law) when, speaking of State territorial subdivisions and also of central governmental departments having separate legal personality, he maintains that "this does not affect the principle of the 'unity of the State' for the purposes of international law" and adds that "to treat public territorial entities as entities separate from the State machinery proper is an error" (CRAWFORD, *First Report*, cit., p. 38, par. 187).

(40) *Yearbook of the Int. Law Commission*, 1998, vol. I, p. 289, para. 77.

federal subdivision, regardless of the subdivision's possibly separate juridical personality. In such a hypothesis — a matter interestingly discussed between Crawford and Pellet in the course of the ILC debate on Article 4 (formerly 5) of the Commission's articles — it would be surely not for international law to lift the "veil" of juridical personality in order to attribute to the State the subdivision's conduct for the purposes of the former's liability. The conduct is in fact State's conduct in that the subdivision is, regardless of any separate juridical personality of its own under the State's domestic law, just a part of the State's organization: an organization, the factuality of which from the viewpoint of international law is attested in the quoted authoritative case-law and doctrine. In other words, the juristic entity's veil is a juridical one from the viewpoint of the State's law, not from the viewpoint of international law, the latter viewing the veil, as well as any other element of the State's legal system, as a factual state of affairs. So, the separateness of the juristic entity that seemed to worry in particular one member of the Commission (41) does not even appear as a *legal* veil in the eyes of international law, that assumes the State's constituent elements just as the whole State's fabric as passively as the lens of a camera perceives and registers the image that the photographer is taking. We shall take a further look, in due course, at the "supplementary role of international law" theory as it would supposedly apply within the framework of the ILC's Article 4, in order to show from a closer, specific angle the absolute uselessness of that purely theoretical tool.

In light of the critique to Roberto Ago's construction and of the above specifications concerning the practical role of international and domestic law about attribution in the context of the judge's or arbitrator's intellectual gap-bridging operation, it would seem hardly indispensable to discuss to any length post-Ago's contributions on the normative theory. None of those contributions, in my opinion, seem to make the normative theory more credible. They all suggest *variantes* of Ago's construction, which do not bring about more support to the normative theory. On the contrary, they bring more elements to a merely factual concept of the operation.

21. Although Condorelli's is the most substantial development subsequent to Ago's 1939 and 1971 construction, the lack of credibility

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(41) PELLET, in *Yearbook of the Int. Law Commission*, 1998, vol. I, p. 232 f., esp. para. 29 ff. and p. 242 f., esp. para. 7.

of the normative theory finds no remedy in his work on "solutions classiques et nouvelles tendances" (42). The implied or express premises of this work are hardly distinguishable from some of Ago's. Firstly, it shares implicitly the axiomatic concept of imputation as an operation effected by legal rules or by judges and arbitrators applying such rules; secondly, it fails, as well as Ago's above-discussed contributions, to fill the gap of jurisprudential pronouncements *specifically* indicating the juridical rather than factual nature of the operation. On both counts Condorelli relies, as well as Ago, on unexplained deductive assumptions. It is worth noting, however, that the author's work felicitously leaves out of his analysis, in so far as I am able to see, Ago's inconsistent arguments on the concept of the States' international persons as *personnes morales*.

Beginning with "solutions classiques", the key to the appreciation of Condorelli's construction and its impact on the credibility of the normative theory is the following passage, prompted by the tenor of Article 5 adopted by the ILC in 1973 (to become 4 in the 2001 Articles). The author wonders whether "il n'est pas contradictoire d'affirmer simultanément, d'une part, que l'organisation de l'Etat est une affaire de droit interne échappant à l'emprise du droit international et, d'autre part, que l'attribution à l'Etat des faits de ses organes s'effectue 'd'après le droit international' (articles 3, lettre *a*), et 5 du projet de la CDI)? L'énigme apparente à laquelle on est ainsi confronté d'emblée révèle l'existence dans ce domaine (comme dans beaucoup d'autres d'ailleurs) d'un enchevêtrement complexe entre droit interne et droit international dans lequel il faut à tout prix essayer de voir clair. En effet, on ne saurait avoir en main la clef de voûte de la problématique de l'imputation tant qu'on n'est pas venu à bout de la question de savoir comment s'agencent les rapports du droit interne et du droit international à ce propos. [...] Il s'agit, en effet, à ce stade préliminaire de la recherche, de recueillir l'ensemble des éléments permettant de comprendre quelle est exactement l'attitude adoptée par le droit international face à l'organisation que chaque Etat se donne par le biais de son droit interne" (43).

Hence the necessity to look at international law's attitude to the State. It will be shown that while on this issue the author seems to profess ideas not very dissimilar from Ago's (not to mention the present writer), on the issue "comment s'agencent les rapports du droit interne

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(42) CONDORELLI, *L'imputation*, cit.
(43) *Ibid.*, pp. 27-28.

et du droit international [à propos de l'imputation]" Condorelli's viewpoint is radically different from Ago's and the present writer's (Triepelian and Anzilottian) view of the relationship of international law with domestic law. In Condorelli's words, "[in]ndiscutablement, en principe le droit international ne réglemente pas la manière de s'organiser de l'Etat [...] [that topic] fai[sant] partie du 'noyau dur' du domaine réservé des Etats" (44).

After wondering whether one could speak — as UN General Assembly's Resolution 2625 (XXV) — of a "droit [des Etats] de s'auto-organiser" (or, "droit à l'auto-organisation"), the author seems to conclude for the negative (45). The absence of obligations in the area is, in his view, a mere consequence of the fact that the State is a *prius* for international law "[qui] s'incline devant le fait que l'Etat existe [...] prend acte et reconnaît [s]a souveraineté [...]" (46). Consequently, "on ne devrait pas parler de droit de l'Etat à s'auto-organiser mais plutôt de droit à obtenir des autres Etats qu'ils ne s'ingèrent pas dans sa manière de s'organiser" (47). "Ce point étant acquis — the author continues — il nous faut cependant, avant de revenir aux questions d'imputation, voir encore si la norme relevée [*sic!*], selon laquelle le droit international n'exerce pas d'emprise sur l'organisation de l'Etat, celle-ci étant un phénomène factuel qui 'précède' le droit et donc lui échappe, ne souffre pas de quelques exceptions significatives. Au fond, s'agissant d'une question ayant trait au *domaine réservé* des Etats, on ne doit pas oublier que celui-ci est représenté par les matières dans lesquelles l'Etat est 'maître de ses décisions', son pouvoir discrétionnaire n'étant pas soumis à des obligations internationales. Or, on ne peut pas exclure *a priori* que des règles internationales en vigueur empiètent sur la matière de l'organisation de l'Etat comme d'ailleurs cela se passe toujours à

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(44) *Ibid.*, p. 28.
(45) *Ibid.*, p. 28.
(46) *Ibid.*, p. 29.
(47) *Ibid.*, pp. 29-30, citing "sur ces questions", in note 25, BARILE, *Lezioni di diritto internazionale*[2], Padova, 1983, p. 34 and GIULIANO, SCOVAZZI, TREVES, *Diritto internazionale*[2], vol. II, Milano, 1983, after mentioning, in note 24, that G. Arangio-Ruiz a "longuement écrit sur cette problématique", citing *L'Etat dans le sens du droit des gens et la notion du droit international*, reprint from *Österreichische Zeitschrift für öffentliches Recht,* vol. 26, 1975, esp. p. 278 ff. [notes 24 and 25 are at p. 180].

At pp. 43 and 45-47 the cited author remarks that the ILC tended to codify pre-existing law — except for Article 19 on crimes — rather than proceeding to "l'exploration de nouvelles tendances" (p. 43). A point to which the author comes back at p. 50 ff., where he speaks, *à propos* of the ILC's early reading of Article 5 (and arguing against Ago's *Third Report*, p. 233 ff., paras. 106 ff.), of "autonomie *prétendue* [du droit international par rapport au droit interne dans l'attribution]" (emphasis added).

l'heure actuelle en ce qui concerne toutes les matières faisant traditionnellement partie du domaine réservé" (48).

Concerning the possibility that international law "'empiète' sur la matière de l'organisation de l'Etat" by way of exception to the normal lack of its "emprise" on the States' international persons' organization, presumably in the sense that international law imposes no obligations on the States concerning their organisation (or in the sense that States are not subject to obligations affecting their organisation), a subject matter that remains within the States' domestic jurisdiction in the sense of areas or matters "dans lesquelles l'Etat est maître de ses décisions", the quoted author insists repeatedly, in his subsequent discourse, on the lack of "emprise" of international law on the States' international persons' organization; that term being used even more largely by the present writer in the work referred to by Condorelli (49). This is also a point where Condorelli's construction appears to me as unpersuasive as his above-mentioned position about the relationship of international law and domestic law (50).

With respect to international law's attitude to the State, it is appropriate for the present purposes to recall that in writings preceding the second World War that question was authoritatively touched upon by Kelsen and Perassi, who wrote respectively of "indifference" or "neutrality" of international law for the States' organisation, and of "liberty" of States with regard thereto: views *prima facie* approaching the point made by Condorelli, and partly justified at their time. On the other hand, such radical ideas appear nowadays subject to some correction by the existence of what I refer to elsewhere as the (so-called) "State or government making-unmaking or modifying — international norms". Examples of such (hard or soft) rules can be found in James Crawford's known, interesting but questionable writings on *The Creation of States in International Law* (51).

Regarding such norms, I reiterate my dated view that while displaying *some* normative function at the level of inter-State relations,

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(48) *Ibid.*, p. 30.

(49) *L'Etat dans le sens du droit international*, cit., footnote 24, at p. 180.

(50) It will be noted that the quoted author had earlier referred to domestic jurisdiction (at p. 28) specifying that "la *matière* [de l'organisation de l'Etat] fait partie du 'noyau dur' du domaine réservé de l'Etat", mentioning in note 22 Ago's *Third Report*, paras. 110-120, and *Nicaragua*, where the ICJ asserts emphatically "le principe plus général qui nous intéresse ici [...] suivant lequel 'chaque Etat possède le droit fondamental de choisir et de mettre en œuvre comme il l'entend son système politique, économique et social' (*I.C.J. Reports*, 1986, p. 131, para. 258, p. 86).

(51) Quoted *supra*, note 39.

their function is as far from resembling the function of domestic law norms concerning the establishment and other vicissitudes of public and private juristic persons and similar not personified territorial or non-territorial partial communities, as international law is far from constitutional or federal law. Indeed, while those norms do establish obligations/rights relationships among some of the affected States with regard to the contemplated makings or unmakings (of States or Governments), they do not bring about *per se* the contemplated *constitutional* — namely, *domestic* law — events at the relevant national level (52). It follows that, despite the said international juridical relationships, the concerned State's organisation remains *in the exclusive hands of the State's domestic law* — and in that sense within what I consider to be their properly understood domestic jurisdiction. It is in that sense that in the work referred to by Condorelli (53), I rightly or wrongly use repeatedly the term "emprise". I say "emprise" to mean *precisely* that the norms in question *do not reach down to the interindividual constituencies or social bases* of the affected States. And it is in that "vertical" sense that I understand domestic jurisdiction: as a protection of the States' sovereignty rather than their freedom from obligation. It follows, as I see it, that the relevant internationally contemplated States' organisations remain, as well as the States themselves, "phénomènes extérieurs" (Ascensio), merely factual domestic state of affairs from the standpoint of internationl law.

So, to use Condorelli's French (probably better than mine), the State's organisation *échappe toujours à l'emprise* — in the sense explained — of international law in general, and the impact of the evoked norms in particular. This is actually in conformity with the present writer's view — firmly adhered to by Ago in his *Third Report* to the ILC — that the State's organisation is not a matter directly affected by international law. As Ago rightly specifies, that elementary truth is not contradicted by the fact that given domestic organs exist within a State's legal system by virtue of that State's (sovereign) compliance with direct or indirect international obligations such as those considered by Condorelli (54).

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(52) I refer to Arangio-Ruiz, *Dualism Revisited*, cit., 2003, pp. 951-956, para. 17; and *The "Dual State", International Law and the UN*, in *Studi giuridici in ricordo di Giovanni Battaglini*, Napoli, 2014, pp. 11-14, para. 7.

(53) Arangio-Ruiz, *L'Etat dans le sens du droit international*, cit. (quoted by Condorelli in note 24 of p. 29 of his Hague Course).

(54) Condorelli, op. cit., p. 26 ff.

In other words — this is essential for the appreciation of the real nature of the process of attribution — the international *factuality* of the (domestically juridical) State organisation *remains* (together with attribution of the organs' conduct) perfectly compatible (short of a "revolutionary" substitution of federal law for international law) with any degree (presently still modest) of international regulation of State making, unmaking or organising.

It is in my view only in that light that one can accept Condorelli's assertion that international law has (nowadays) *no* "emprise" over the States' organisation. There is, indeed, "emprise" and "emprise". One thing is the *emprise* inherent in an international norm imposing upon a State the obligation to possess or modify, within its legal system and by that system's legislative processes, a given organ or set of organs. An entirely different thing is an international [*rectius*, federal] norm directly creating or modifying such organ(s). Only the latter kind of (theoretical) "emprise" would give rise to a successful plea of domestic jurisdiction properly understood (55).

Back to imputation, Condorelli unsuccessfully opposes Ago's assertion that international law is totally independent in effecting attribution. In the first place — assuming that attribution was a matter of law instead of a mere *quaestio facti* — it would be inconceivable that it was to take place on the basis of any legal system other than the (international) system within which the State's international liability may be predicated. Secondly, there is no such thing as an *enchevêtrement* (or *embrouillement*) of domestic and international law with regard to attribution. Both legal systems are *originaires*, namely not deriving from each other. The view that they may *juridically* jointly operate with regard to any situation as if they were part of the same system is incompatible with such features of domestic and international law as well as with their respective merely factual foundation.

Furthermore, any idea of *enchevêtrement* is inconsistent with that author's correct opinion concerning international law's attitude to the State, notably the State's organisation. The idea of *enchevêtrement* is not only different from Ago's firmly Triepelian view of the relationship among juridical systems but also inconsistent with Condorelli's own above-described essentially correct factual concept of the State from the standpoint of international law. If the State is an independent historical fact — a *phénomène extérieur* — from the standpoint of

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(55) ARANGIO-RUIZ, *Le domaine réservé*, *Recueil des cours*, vol. 225, 1990-VI, and *The "Dual State"*, cit., pp. 23-26.

international law, its legal system cannot be derived therefrom. Factuality of the State and factuality of its legal system from the standpoint of international law are, practically and theoretically, two faces of the same coin.

By this way, Condorelli himself acknowledges, in good substance, that attribution is not the effect of any monstruous (normative) *enchevêtrement* of international and domestic law. Attribution is the result of the *intellectual operation accomplished by the judge or arbitrator in bridging, on the basis of the facts of the case, between the internationally questionable human conduct and the allegedly respondent State,* international law passively ...assisting merely as a *camera* (in the hands of judge or arbitrator) *registering the factual relationship* between the conduct's author(s) and the State's structure, the existence of an author(s) who has (or have) domestic law organ status representing nothing more than an *indicium* of the appurtenance of the persons concerned to the respondent State's (factual) organic structure. Unless I am mistaken, international law passively registers or makes the judge or arbitrator register what Condorelli sums up at p. 56: "Autrement dit, dans, ces situations aussi [namely those of "particuliers qui, dépourvus du statut d'organes d'après le droit interne, se voient conférer ou s'arrogent publiquement des tâches étatiques"] ce qui est imputé à l'Etat d'après le droit international n'est autre chose que l'ensemble des faits accomplis par l'une ou l'autre des composantes formant l'appareil organique de l'Etat, tel que celui-ci l'a effectivement et souverainement édifié", with the caveat, on my part, that "l'ensemble des faits accomplis par l'une ou l'autre des composantes formant l'appareil organique" is nothing but *the effective state of affairs*, the State's domestic law being not law (or nothing normative), but simply that domestic law's effect combined with any factual variations thereof. This applies to both Condorelli's and Ago's position.

Concerning the distinction between *de iure* and *de facto* organs or agents — Condorelli and many others referring to the domestic law's distinction—, it is utterly superfluous, both kinds of organs being furthermore surely not *de iure* but merely *de facto*, as well as the whole State's fabric and legal order — as authoritatively demonstrated by the forgotten Heinrich Triepel — from the standpoint of international law. It is hardly necessary to add that this is not to be understood as an acceptance of Ago's assertion of international law's independence — within the framework of his version of the normative theory — in effecting imputation. Ago is in that respect even less consistent than Condorelli because, unlike the latter, he was a firm adherent to

Triepel's dualism. The weakness of Condorelli's theory is also manifest in the pages relating to the circularity between imputation and *infraction* (liability) (56).

Moving to exceptions and deviations, Condorelli proposes "[de] voir encore si la *norme* [*sic!*] *relevée* [*sic!*] suivant laquelle le droit international n'exerce pas d'emprise sur l'organisation de l'Etat, celle-ci étant un phénomène factuel [*sic*!] qui 'précède' le droit et donc lui échappe, ne souffre pas des exceptions significatives" (57).

The exceptions to "la norme ainsi relevée" [a norm actually inexistent and by the author himself contradicted both in the present passage as well as previously] are the organic reforms indirectly or directly imposed by international law in the areas of human rights protection and diplomatic relations.

The "deviations", namely "les nouvelles tendances" (58), would be a number of instances such as: the principle "établissant l'imputation à l'Etat des comportements spatiaux illicites de particuliers" envisaged in Article VI of the 1967 Space Treaty; the extension of the same principle to the régime of Direct Satellite Television (DST), to the "nouvel ordre mondial de l'information et de la communication (NOMIC)" (59), to the area of military nuclear activities (60), to the area of environment protection (61), to the field of activities in the International Sea Zone (62), to the area of State responsibility for "actes commis par les personnes faisant partie de ses forces armées" (63), to the area of human rights protection (64) and with regard to State responsibility for the activities of transnational enterprises (65). Within the same Chapter III, the author finds similar "deviations" in the area of "[l]e droit de la

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(56) Another point of disagreement from Condorelli's imaginative but unfounded propositions relates to his reiterated reference, in about the same page (op. cit., p. 28), to what, inconsistently with his own explicit denial reported *supra* in this paragraph, he calls the State's "droit à l'auto-organisation" (p. 28 f.). Such a "droit" (about which the author himself states that one could not speak of (p. 29)), is manifestly inconsistent with the phrase "effectivemnent et souverainement édifié": a new, clear admission that that "droit" does not exist. This curious confrontation between two normativists is just another piece of evidence that the normative theory holds no water.

(57) CONDORELLI, *L'imputation*, cit., p. 30, emphasis added.

(58) See Chapter III of Condorelli's Course, *ibid*., pp. 117-167.

(59) *Ibid.*, pp. 126-131.

(60) *Ibid.*, pp. 131-134, esp. pp. 133-134.

(61) *Ibid.*, pp. 134-138, esp. pp. 136-138.

(62) *Ibid*., pp. 138-144, esp. pp. 143-144.

(63) *Ibid.*, p. 146, esp., pp. 145-149.

(64) *Ibid.*, pp. 149-156.

(65) *Ibid.*, pp. 156-163.

guerre, ou d'une ancienne hétérodoxie en fait d'imputation" (66), where he seems inexplicably to consider the responsibility of States for the conduct of the members of their armed forces in wartime, or also in time of peace.

Condorelli explains the said instances as exceptions to the general non appurtenance of individuals to the core of the State's international person. In conformity with the prevailing trend, particularly among some Italian scholars, the State's international person's corporeity consists essentially of its organization or government in a broad sense (67). In Condorelli's words, "si l'Etat ne peut manifestement pas être conçu sans référence à une sphère spatiale (son territoire) et à une sphère personnelle (sa population) ...il semble évident par ailleurs que ces deux élements (ou 'dimensions') vus dans l'optique de la responsabilité internationale, ne sauraient être placés conceptuellement sur le même plan — ou rang — que l'organisation".

According to Condorelli, then, individuals are in principle — as well as territory and, in my view, the domestic legal system — not part of the international person's corporeity, the private person being so to speak, according to the author, "'expuls[ée]' du concept même de l'Etat au sens du droit international". Consequently, "les agissements de particuliers matériellement contraires au droit international ne représentent [pas] des faits internationalement illicites" (68). Condorelli recalls "le principe traditionnel suivant lequel 'n'est pas considéré comme un fait de l'Etat d'après le droit international le comportement d'une personne ou d'un groupe de personnes n'agissant pas pour le compte de l'Etat'" (Article 11, para. 1, adopted on first reading by the ILC) (69).

As stated, the new trends in international law would have introduced deviations from this principle. In the listed alleged deviations, according to Condorelli, "une règle spéciale établi[rait] que les comportements de particuliers (les 'entités non gouvernementales') sont [...] assimilés à ceux des organes et entités de l'Etat, et donc imputés

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(66) *Ibid.*, pp. 145-149.

(67) See, in particular, in addition to ARANGIO-RUIZ, *L'Etat dans le le sens du droit international*, cit., pp. 50-63, ID., *Sulla dinamica della base sociale nel diritto internazionale*, *Annali della Facoltà di giurisprudenza dell'Università di Camerino,* vol. XXI, Milano, 1954, pp. 55-97, dealing with territory, population and also with the legal order (not considered by Condorelli). German and Italian literature are indicated therein.

(68) CONDORELLI, *L'imputation*, cit., p. 115.

(69) *Ibid.*, p. 126.

directement à celui-ci" (70). Having regard notably to space activities "toutes les fois qu'un problème spécifique de responsabilité pour fait illicite se présente en liaison avec le droit de l'espace, celui-ci est immanquablement réglé en utilisant les principes dérogatoires sur l'imputation que consacre l'article VI du Traité sur l'espace et non pas faisant appel au principe traditionnel" (71). In note 202 the author remarks — with regard to the spatial law exception, and implicitly all the other listed *déviations* — that "ce n'est pas seulement dans la doctrine soviétique qu'on voit les particuliers autorisés à mener des activités spatiales comme tout à fait assimilables à de véritables organes d'Etat" (72).

I have more than just the impression that the alleged "nouvelles tendances" as a whole are no such thing. There is really no "dérogation" from the common, merely factual attribution process. The only "dérogations" or "déviations" — assuming they so qualify — are (i) express and/or more demanding States' obligations of "veiller" and/or "assurer"; (ii) "alourdissement de la responsabilité" resulting from "mal-veillé" or "non-assuré"; (iii) direct attribution of liability to States for internationally questionable private parties' conducts, and this on the basis of the operation of the relevant primary norm establishing the State's liability (73).

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(70) *Ibid.*, p. 123.

(71) *Ibid.*, pp. 125-126.

(72) *Ibid.*, p. 207.

(73) Condorelli offers no support to the alleged deviations or exceptions in which he seems to rely in order to demonstrate new tendencies of international law to intervene (as a matter of direct effect) in the organization of States. Taking for example spatial activities, the author offers no persuasive evidence theoretical or practical of the secondary (attributive) function exercised — by way of deviation from traditional (classic) rules or "nouvelles tendances" — of the relatively more stringent rules concerning the responsibility for such activities (p. 121 ff.). The aggravation of liability is achieved simply through the relevant conventional or customary primary rules. The only real exceptions are those (existed now for a long or some time) concerning diplomatic envoys, military commanders in given circumstances and, of course, the competence in the conclusion of treaties (see MORELLI's *Nozioni di diritto internazionale*[7], Padova, 1967, and ARANGIO-RUIZ's *Gli enti soggetti*, cit.). No real *entorse* thereby to domestic jurisdiction properly understood: and no evidence, in conclusion, in support of the theory of a juridical (instead of factual) attribution of conduct process as a juridical operation distinct from the primary rules' attributing responsibility. In all such cases, and any similar ones, the aggravation of liability is achieved quite simply through the relevant conventional or customary primary rules.

The same must be said about Professor DIPLA's valuable book (*La responsabilité de l'Etat pour violation des droits de l'homme: problèmes d'imputation*, Paris, 1994) supposedly dedicated, according to the title, to "*problèmes d'imputation*". That book contains a remarkable analysis of the European Court's and/or Commission's human rights decisions, but none of the cases' analyses shows any evidence of the operation of

The common, traditional, classic regime of the responsibility of States for private parties' conduct undergoes no derogations except for the *more demanding* States' *obligations* with regard to the control of given private parties' activities as compared to the common, more usual general obligations incumbent upon States for the prevention, suppression, correction, "remedy" of private parties' internationally objectionable conduct (involving other States or their nationals). The *déviations* evoked by Condorelli as alleged "new trends" of international law in its attitude to the organisation of the States' international persons are in reality perfectly self-sufficient primary rules on States' liability. They need no *ad hoc*, or otherwise special attribution norms (74).

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attribution norms distinct from the relevant primary norms attributive of responsibility. The author's conclusion practically obliterates the second part of her book's title.

(74) A glance at the "authorities" cited by the author in support of the alleged "deviations" from the "imputation"'s traditional (or classic) allegedly juridical (normative) *régime* suffices to show that none of such authorities explicitly or implicitly adheres either to the normative theory in general or to the notion that the "deviation" instances affect attribution (or "imputation") as an international *juridical* operation distinct (or otherwise separate) from the attribution of responsibility (or, for that matter, liability). While one finds, of course, acknowledgment of aggravation of the State's responsibility and liability consequent to the provisions attributing direct State responsibility for the private parties' or other non-governmental entities' conduct, one finds *no support* whatsoever for the notion that the evoked international (conventional or customary) rules deal with *attribution of conduct to States as a legal operation* distinct from the attribution of responsibility. Such is the case with TREVES, *Les tendances récentes du droit conventionnel de la responsabilité et le nouveau droit de la mer*, *Annuaire français de droit int.*, 1975, p. 767 ff., at p. 780 f.; HANDL, *State Liability for Accidental Transnational Environmental Damage by Private Persons*, *American Journal of Int. Law*, 1980, p. 525 ff., at p. 564; PAPACOSTAS, *Quelques aspects sur les conséquences juridiques qui résultent du système consacré de la responsabilité pour l'activité développée à* [sic] *l'espace*, in *Proceedings of the Ninth Colloquium on the Law of Outerspace* (Schwartz ed.), Madrid, 1966, p. 100 f.; LOPEZ GUTIERREZ, *Legal Status of Space Vehicles*, in *Proceedings of the Ninth Colloquium*, cit., 1967, p. 132 ff., at pp. 137, 139 f.; COCCA, *Fundamental Principles of Space Law: a Latin American viewpoint*, in *New Frontiers in Space Law* (McWhinney and Bradley eds.), Leiden, 1969, p. 61 ff., at p. 68; REIJNEN, *Utilization of Outer Space and International Law*, Amsterdam, 1981, p. 119; CHENG, *Le Traité de 1967 sur l'espace*, *Journal du droit int.*, 1968, p. 533 ff., at pp. 583-585. As concerns YOUKOV, *Principes généraux du droit international de l'espace*, in *International Space Law* (Piradov ed.), Moscow, 1976, p. 125 ff. (cited by Condorelli, at p. 207, note 202), I have been unable to find, in the cited pages, any reference to the issue.

A curious piece is that of DUTHEIL DE LA ROCHÈRE, *La Convention sur l'internationalisation de l'espace*, *Annuaire français de droit int.*, 1967, p. 607 ff., at p. 634, where the confusion is total, due both to the different meanings of responsibility (in English more than in other languages) perhaps misunderstood by the author, and to the latter's remark that: "La traduction française ne permet pas de rendre compte avec autant de précision que le texte anglais de la *différence entre le problème de l'imputation ("responsability") [sic] des activités spatiales aux sujets de droit international* — article 6 — et celui de la *responsabilité ("liability")* [*sic*] encourue pour les dommages causés dans l'espace — article 7" (*op. loc. cit.*, emphasis added).

Indeed, the author's conclusions on "nouvelles tendances"— an ingenious invention — brings no remedy to the weakness of the normative theory of attribution as it results from the discussion of Ago's theory of 1939 and 1971, either with regard to the State and its organisation (except for the obvious *pastiche* on "droit à l'auto-organisation" or "droit de s'auto-organiser", a point where he ends up with the admission that there is no real "right" and no real norm — international law *taking* the State as a *prius* with its sovereignty). On the contrary, one is impressed, *inter alia*, by a certain confusion between the dichotomy "imputation of conduct/imputation of responsibility", on the one hand, and the dichotomy "secondary norms/primary norms", on the other hand. In the author's words: "[pas de] césure nette entre niveau primaire et niveau secondaire". In the same concluding lines of para. 10 of Chapter III (op. cit., esp. pp. 166-167), one is struck by the author's stressing: (*a*) that the applicability of "principes communs" must in any case be presumed until a *dérogation* (conventional or customary) is not positively demonstrated (op. cit., p. 166); (*b*) that contemporary international law does not know any more [in Condorelli's view] a *corpus* unique and consistent of principles concerning imputation. On the contrary, due to a process of "*stratification normative*", international law is presently characterized by "des orientations disparates et par conséquent des règles divergentes", responding to the diversity of the needs manifesting themselves in the international social milieu (p. 166). A discourse resembling much that — equally hardly consistent with the normative theory — of the *Tadić* Appeal Chamber's judgment ([75]).

([75]) On other important points (*inter alia*) Condorelli's construction seems to me questionable. One is the inconsistent position he takes with regard to (Ago's) "prétendue autonomie" of international law from municipal law for the purposes of attribution: where, in addition to the erroneous assumption of an active role that does not exist except in the normativists' imagination, one must register the error of restricting or denying the international judge's freedom of independent appreciation of the facts, where appropriate, from the provisions of municipal law (or, for that matter and, in my view, from the factual connection of the acting private person [*rectius*, of that person's conduct] with the State's international person). Another highly questionable point is, of course, the author's initial pastiche on the State's nature from the standpoint of international law (that part being very poorly and, as shown *supra*, inconsistently reasoned: particularly with regard to the contradiction between the supposed "droit de s'auto-organiser" and the conclusion that "on ne devrait pas parler de droit de l'Etat à s'auto-organiser mais plutôt de droit à obtenir des autres Etats qu'ils ne s'ingèrent pas dans sa manière de s'organiser" (pp. 29-30)).

V.

CONCLUSIVE REMARKS: THE PROPER NOTION AND REGIME OF ATTRIBUTION

CONTENTS: 22. Nature of the ILC alleged norms. — 23. Juristic persons in the proper sense. — 24. Factual corporeity of the State's international person. — 25. Tomaso Perassi's and Gaetano Morelli's formally similar but radically different positions. — 26. Normative concept as cause of confusion. — 27. The factual complexity of the State's international person's conduct. — 28. Conclusions.

22. Prior to touching upon the normative theory's theoretical premises, it should be highlighted that references to that theory do not appear in the arbitral and judicial decisions preceding the Nineteen-seventies. The cases considered in Ago's Third Report show that arbitrators, commissioners and judges worked out attribution in an artisanal way, assembling all the factual elements more or less likely to involve the respondent State without resorting to legal rules (except those governing the adjudicating body's procedure). In other words, they dealt manifestly with attribution as an integral part of *quaestio facti*, evoking mostly nothing more than similar precedents and approaching normativity only by such generical, vague and ambiguous concepts such as principles or usages.

Another strong piece of evidence of the non-existence of a normative approach to attribution was the 1927 session of the International Law Institute, where neither the Strisower Report and comments thereto, nor the Lausanne debates, nor the well-known resolution on State responsibility for injuries to aliens contain any mention of attribution or of legal rules or principles relating thereto, other than the primary rules attributing responsibility.

The earliest egregious expression of the first of the above-mentioned assumptions — a point of not small consequence for the theory of attribution — is to be found in Roberto Ago's magisterial 1939 course *Le délit international*. It is in that course that one finds the assertion that "les sujets [du droit international] sont constitués précisément par les plus typiques et les plus parfaites des personnes juridiques, par *les personnes juridiques par excellence, c'est-à-dire par les*

Etats" (emphasis added) (1). As regards Professor Crawford, who brought the ILC work on attribution to its conclusion between 1996 and 2001, he must have had pretty similar views on the nature of the State's international person, having written a scholarly article and two editions of a volume on the "Creation of States in international law": a title that is more than just reminiscent of the manner in which juristic persons (unlike natural persons) come into being (2).

Moving to the second assumption, it was on the basis of the above reported notion of the State's international person that Ago felt enabled to assert, in dealing with the so-called "subjective" element of an international delict, that "cette imputation [juridique de l'infraction à l'Etat] n'est évidemment pas un lien créé par la nature: elle est le résultat d'*une opération logique effectuée par une règle de droit*, donc un lien juridique" (3) (emphasis added). And it was on the basis of that same concept that the other above-mentioned Special Rapporteur secured — perhaps too easily — the ILC's adhesion to the idea that attribution "is based on criteria determined by international law and not on the mere recognition of a link of factual causality". Both assumptions call for verification.

23. To begin with the notion of juristic persons (*personnes morales*), logically preceding the concept of the State's international person as such a *personne morale*, it is useful to focus here on the English language literature (the continental European doctrine being amply taken into account in rather dated works of ours): I refer directly to the widely known definition by Chief Justice John Marshall, as quoted by Blumberg (4): "[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence" (emphasis added).

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(1) AGO, *Le délit*, cit., p. 462.

(2) CRAWFORD, *The Creation of States in International Law*, cit.

(3) AGO, *Le délit*, cit., p. 450. The reader can find abundant references to other Italian scholars holding identical or very similar views in ours *Gli enti soggetti*, cit.. Some *nuances*, particularly in MORELLI's *Nozioni*, cit., are noted in ours *Dualism Revisited*, cit., p. 909 ff., at pp. 942-944, note 58.

(4) BLUMERBG, *The Multinational Challenge to Corporation Law, The Search for a New Personality*, Oxford, 1993, p. 26. Blumberg quotes Marshall from *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). He adds also *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86-91 (1809). Blumberg notes in the text (p. 26) that the quoted terms "were borrowed from the English jurists, but Marshall's emphasis on the term 'artificial' was his own".

While stressing that this "doctrine has an ancient jurisprudential history", that it "has attracted wide support over the centuries on the Continent [...], as well as in England and the United States, and has appeared in a number of variant forms [...] all [...] center[ing] on the corporation as an 'artificial' or 'fictional' legal unit" (5), Blumberg concludes that "[i]n recent decisions [...] no less than four Supreme Court justices relied on Marshall's description of the 'artificial person' theory [...] while a fifth gave it intermittent support" (6). The same author extends his analysis to other theories, starting with von Savigny's fiction theory, the brackets and symbolist theories and the realist or realistic theories. Although Blumberg rightly opines (as well as other writers) that "each of the three theories has something to contribute" (7), this is, I believe, an understatement of the decisive merits of what looks by far the most correct notion of a private or public corporation under any national legal system including, among the latter, the State as a juristic person under national law. I refer to the theory according to which the corporation is, under positive law, a juridical entity. If one sets aside the terminological municipal redundancies by which some of them are embellished by the imaginative language of their adherents, none of those theories detracts from Marshall's not wholly original but accurate notion of an entity created by the law and as such artificial, incorporeal and "invisible", existing as a legal instrument, and, in that sense "only in contemplation" of the law. Based as it is, in our view, on positive law, that description is not improved (when it is not obscured), either by von Savigny's "fiction" theory (or the very similar "bracket" and "symbolistic" theories) or by the "realist" or "realistic" theories such as Gierke's organic concept and the not very dissimilar doctrines that identify the *personne morale* with the aggregation of its individual members, agents and beneficiaries, viz. the so-called substratum (8).

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(5) *Ibid.*.

(6) Blumberg's note 9 referring to his further notes 54-56.

(7) *Ibid.*, p. 28.

(8) *Ibid.* Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, *The American Journal of Comparative Law*, 1999, p. 583 ff., at p. 584, note 3, observes that the "corporate realism/corporate nominalism/fiction theory triad is by no means standard, and various triads have been used by various authors". He lists various examples, including the "bracket theory", Jhering's "symbolist theory" and Brinz's "purpose theory". Apart from the fact that none of these theories contests the centrality and essentiality of the role of law in the person's creation and vicissitudes — including extinction — it is obvious that von Savigny's and his followers' fiction theory is, as well as the bracket's and symbolist theories, just another way to describe the incorporeal, mere "creature of

It is important to stress that the purely legal nature of corporations and juristic persons in general is solidly founded not just in authoritative scholarly works but, more significantly, in the positive law of codified as well as non-codified national legal systems, the creator of such artificial persons being precisely the law (or legal system) rather than the State (9). This is confirmed by our dated study of the legal nature of the creation, the extinction and any other vicissitudes of *personnes morales*, including the State itself as a person of municipal law (10). Conclusively, juristic persons are legal instruments within the legal system of a society, the primary members — and legal subjects — in which are natural persons. Juristic persons exist and operate not as "given" corporeal entities but as legal instrumentalities of relations among natural persons. In that sense, *personnes morales* are "secondary" persons as compared to the latter.

Coming to the State's international person (generally not distinguished from the State's person of municipal law except for the different source of personality), it is mostly viewed as the external face of a two-faced coin, the opposite face of which is the State's *personne morale* of municipal law: the internal face personified by municipal law, the external face by international law (11). Regarding the nature of the

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the law". Gierke's organic theory, for its part, as well as the other theories stressing the underlying presence of the associates' and agents' human aggregate (mostly without contesting, though, the decisive role of the law), points simply to what continental European scholars have long been calling the juristic person's *substratum*, which is nothing else but the social reality underlying the juridical creature as the *raison d'être* of the latter's creation and — at the same time — the implementation of the creature's statute.

(9) An important element of Marshall's clear definition is his explicit reference to "law", thus correcting *ante litteram* the tendency of a considerable number of subsequent commentators to see "the State", rather than *just the law* as the "creator" of juristic persons. Although the State — as impersonated by the executive, the legislator or the constituents — is quite frequently called to put a final touch to the erection of private or public juristic persons, particularly their personification, the real creative agency of a juristic person is the legal system, by whichever institutions it may be impersonated for either purpose. No State institutions are directly involved, for example, in the erection of *societés commerciales* in Italian or French law. The creation is effected by (codified) law or *ad hoc* legislation on the condition, naturally, of the appropriate private transactions (acts); and it is a juridical, not a factual, event. That the State is not necessarily involved as the "maker" in (at least) the national legal systems of most continental European countries, is confirmed by the fact that the State itself possesses under the law of those countries a juristic personality.

(10) *Gli enti soggetti*, cit., *passim*; and *Dualism Revisited*, cit., pp. 946-949, para. 15 (*a*)-(*c*).

(11) The same dual (personality) construction is applied to the so-called international persons other than States, such as insurgents, governments in exile, Roman Church, liberation movements *et similia*.

entity in question — the coin itself — a marked difference exists between Kelsen and his followers, on the one hand, and Anzilotti's school, notably Ago, on the other.

Kelsen's view is the simplest. The State's international person is for him the very same juristic person he identifies, as well as any other juristic person, with its legal system, namely, for the State, municipal law (12). This vision is consistent with both that author's concept of *personnes morales* in general — a concept we share — and with his well-known theory (contradicted in our view by obvious realities) of the universal unity of the law. It is natural, within the framework of such a theory, to view the State's international person as a legal order, namely the State's municipal law.

The matter takes a more problematic turn within the framework of Triepel's and Anzilotti's doctrine more realistically envisaging international and municipal law as separate. In particular, Anzilotti and most Italian and German adherents to that theory had proceeded, in the early part of the twentieth century, to a remarkable *vindicatio in libertatem* of international law from municipal law in the realm of personality. Anzilotti emphatically stressed that the States' international persons were "les Etats du droit international, non ceux de la sociologie, de l'histoire, ni non plus du droit interne" (13). Notwith-

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(12) Kelsen's identification of juristic persons (*personnes morales*) with their respective legal orders meets the present writer's unconditional adherence and is supported by the authorities cited above. On the contrary, the present writer is opposed, as shown further on, to Kelsen's (unwarranted) extension of the juristic person's concept to the State's person of international law. It may be noted, incidentally, that the consistency of Kelsen's identification of the State's international person with the State's juristic person seems to be somehow contradicted by the view expressed in Kelsen's *Principles*' second edition (*Principles of International Law*^{2}, New York, 1966) that attribution could be effected, in certain cases, directly by international law. The point is made by Ago in *Third Report*, cit., p. 219, para. 60, note 82, who adds, however, that the possibility in question was added in the *Principles* by Tucker, editor of that book's second edition. The *Principles*' passage in question is at pp. 197-198, note 13. I refer to Kelsen's distinction of the States' personalities as "formal" in that international law and municipal law are, according to Kelsen, distinct but neither separate nor as different as they are more rightly deemed to be by scholars not adhering to his concept of the unity of all law. The sense and the extent of Kelsen's distinction of the State's two personalities is not quite clear to the present writer.

(13) ANZILOTTI, *Cours de droit international* (Gidel's translation from the 3rd Italian ed.), Paris, 1929, p. 125. Anzilotti went far enough, with respect to the distinction from the State of municipal law, as to specify, first: "il n'est pas difficile de voir que dans ces cas le mot 'Etat' désigne un *sujet juridique différent* de celui auquel se réfère le même mot en droit international. Ici, comme dans beaucoup d'autres occasions, la considération de l'*identité de substance du substratum de fait, qui sert de base à la personnification* (ce type donné d'organisation sociale), a prévalu sur les exigences d'une considération rigoureusement normative, laquelle est le propre de la

standing, though, this convincing *vindicatio*, Anzilotti and his followers deemed it not necessary to verify to what extent the State entity vested with personality in international law differed from the State entity personified in municipal law. On the contrary, most adherents to Triepel and Anzilotti's dualism take for granted that the personified entity is the same on both sides; the difference residing, it appears, in the distinct personalities (internal and international) enjoyed by the entity, namely in the different (and, for them, separate) sources of the said personalities.

The striking feature, however, of the dualists' position is that while conceiving the State's international person as a juristic person as well as the State's person of municipal law, they identify both entities, under the influence of the so-called "realist" or "realistic" theories of juristic persons, particularly Gierke's and other scholars' organic theory, with what is generally referred to as the substratum of the juristic person, namely with the corporeal, organically structured, body consisting essentially of an aggregate of natural persons. Professing as they do a questionable concept of juristic persons, they seem not to perceive that the substratum they evoke underlies (rather than constitutes) what von Savigny, Marshall, Kelsen and others (including ourselves) believe the *personne morale* to be (14).

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science du droit qui, partant du concept que la personnalité exprime une corrélation entre une *entité et un ordre juridique determiné*, ne peut pas ne pas voir *deux sujets différents là où le langage commun semble en designer un seul*" (*Cours*, p. 54, emphasis added). Second, Anzilotti specifies that a State (legitimately) operating within the legal sphere of another State did so as a "particulier quelconque" or an "individu quelconque", namely as a "sujet juridique différent" from the State as an international person (*ibid*., at p. 55); and that distinction was corroborated by the same author in a passage where, after recalling that "l'Etat lui-même" is subject to the law of the host State, emphasized "le mot 'Etat' indiquant alors le sujet d'un ordre juridique interne déterminé et partant un sujet *différent de l'Etat sujet de droit international*" (*Cours*, p. 405, emphasis added). A criticism of Anzilotti's position is formulated by Kelsen at p. 377 of *General Theory*. The present writer's position on the State's international person's concept could rightly be understood as a logical application of Anzilotti's *dictum* (*Cours*, p. 405).

(14) According to the realists' and Gierke's concept, a business corporation would consist instead of its members, its agents and its assets, and a charitable foundation of its agents, its assets and its beneficiaries. That is what the *substratum* of the corresponding *personne morale* would be according to the "realist" or "realistic" theories of juristic persons. Similarly corporeal seems to be, if I understand it correctly, Anzilotti's and most dualists' concept of the State's international person. I am unable to see what else (*mutatis mutandis*) Anzilotti's *substratum* could possibly mean. This is confirmed by the widely spread acceptance, by most Italian dualists, of Donato Donati's concept of "persona reale" of the State, a notion applied by him as well as his followers to the State's national as well as international person. See DONATI, *La persona reale dello Stato*, Milano, 1921.

In other words, instead of Kelsen's totally juridical entity personified in unison by municipal and international law, the cited dualists (Anzilotti and Ago in particular) envisage a single, Janus-faced, factual entity, namely the substratum of the State's legal system. Notwithstanding, though, its factual, organic essence, the entity in question — the State of international law as well as the State of municipal law — is equally conceived by them, due to their questionable concept of *personnes morales*, as a juristic person, if not, as Ago emphatically put it in 1939, as a "personne juridique par excellence" (emphasis added).

With regard to the dated debate on the topic between Anzilotti and Kelsen — a debate to which, unfortunately, too little attention if any is being paid by the numerous adherents to the normative concept of attribution — the present writer has no choice but to pick and choose, so to speak, from among both masters' writings according to whether he is able to agree with the one or the other. The notion of the State's international person would thus rest for me, in positive, upon Kelsen's concept of the State's person (of municipal law) as a juristic person, notably as a legal order, on the one hand, and on Anzilotti's distinction of the State's international person from the State's person of municipal law, on the other hand. In negative, the notion in question would rest upon the rejection of Kelsen's arbitrary assertion that the State's person of international law is nothing more than a legal order "delegated" by (or "derived" from) international law, on the one hand, and upon the rejection of Anzilotti's undemonstrated qualification of the State's international person as a juristic entity: the latter concept being not only in contrast with the nature of the basic constituency of international law but manifestly contradicted by Anzilotti's identification of the entity with a substratum which is not recognizable in any sense as a juristic person.

The present writer concludes, therefore, that, while the State's person of national law — wherever the State is personified — is a juristic person in a proper sense, namely in the sense specified above, the State's international person is no such thing. It is a corporeal, space-filling collective body and in that sense, though possessed of personality under international law, not a juristic person of that law. Correctly envisaged, the States' international persons are the primary persons within a unique, *sui generis* normative system that presupposes States in essentially the same way municipal law presupposes human beings. That this state of affairs is a regrettable one — due as it is to the same factors causing international law to be what it is (instead of the law of the community of mankind) — does not make it any less real.

24. Considering that the present writer has dealt with the nature of the State's international person more than enough — though less successfully than he would wish — he shall not dwell here on the matter to any length. I refer the reader to previous writings as well as to the keen commentary of that dated demonstration contained in the remarkable Palmisano article on State responsibility of 1992 (15). I only need to insist here on some indispensable precisions made in *Dualism Revisited*, cit., with regard to the generally ignored or misinterpreted impact, on the nature of the State's international person, of the rules of international law touching, in one way or another, upon the formation, the modification, the dissolution, or any other vicissitudes of States. I refer to the so-called "State-or-government-making-or-unmaking norms".

It must be acknowledged, indeed, that the establishment, modification and dissolution of States are frequently contemplated not just by international political instruments but also by international treaties or, presumably, even by customary norms. Such norms set forth rights and obligations relating to conduct that States should take with regard to the establishment, modification or dissolution of given States. There are also norms binding States to adopt or not, or to maintain or not, a given regime or a given kind of regime. All such rules are intended to favour or hinder — such as by recognition or, respectively, non-recognition by other States — the creation, modification, dismemberment or dissolution of a given State, or the change or maintenance of a given kind of regime, in one or more (but theoretically, even all) States (16).

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(15) PALMISANO, *La colpa dell'organo*, cit.

(16) The last few decades have witnessed a relative frequency of interventions — through merely political action or on the basis of more or less strict rules — in the "making" and "un-making" of given States or governments; and it is not unlikely that some general rules exist — and more are coming into being — relating to the regimes of States, particularly democratic government. This is partly an effect of the "humanization" of international law through the promotion of protecting human rights, the international prosecution of crimes and self-determination. Another question is, of course, the *rôle* that also seems to be played by the more or less justified political or military pressure exercised by some States. One cannot share entirely, therefore, the views expressed long ago by Kelsen and Perassi about the "indifference" of international law with regard to States' regimes or the "liberty", if not the "right", of States to adopt the organization they want. A liberty, a freedom, or even a right of States to organize themselves can be conceived only for existing States. For States-to-be, one could only speak of a (natural) right of peoples or just human beings to set up a State. No doubt, the given State's or government's establishment or modification may be condemned as unlawful under those norms and possibly opposed by the other States concerned — by any measures including, possibly, refusal to establish or maintain diplomatic relations, or refusal of admission to international organizations. The target State will nevertheless be a State (from the standpoint of general international law) for

As explained in the cited writing, contrary to the apparently prevailing understanding of such phenomena, the norms in question do not perform any direct juridical function with respect to the constitutional events affecting the States involved. Two capital differences must be acknowledged that partly explain Perassi's and Kelsen's above-cited drastically negative propositions. Firstly, however strictly the States involved may have complied with relevant international rules, a State or government set up or modified in disregard of the applicable rules may nevertheless obtain the allegiance of its people (as well as the respect of other peoples), the possible reaction of the interested other States bearing no direct legal impact at the interindividual national level or levels. *Viceversa*, a State or government established or modified in conformity with the applicable international rules may well be lawfully resisted or otherwise opposed — at the national level — by its people and possibly by other peoples. Secondly, even at the level of strictly inter-State relations, the conformity or nonconformity of relevant events to the international provisions in question is not juridically decisive of the legal status of the State or government possibly at stake from the viewpoint of international law itself. It must thus be acknowledged, if one wants to envisage the matter with the necessary rigour, that from the standpoint of inter-individual as well as inter-State legal relations, the situation differs in quality so radically from the comparable situations involving national legal persons or subdivisions, that to speak of the "creation" of States or the establishment of governments "through" international law is an oxymoron (17).

The point I am making can be summed up in the following terms. The setting up of legal persons of national law — and of the State itself under national law — is a juridical event with regard to both the establishment of the entity and its elevation to personality. The establishment of a State in the sense of international law is a juridically relevant fact, the only juridical event attached thereto by international

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the purposes of international legal personality, for the purposes of the so-called international representation of the State, as well as for any other aspects of the international legal relations of the target State or government.

(17) The vicissitudes of legal persons under any national law are governed within the legal system in such a way that the establishment, modification or dissolution of the entity is universally and directly operative — as a *juridical event* — for any physical or legal person under that law. The same must be said, *mutatis mutandis*, of the State's juristic person within the law of a national community. The *primissima facie* similar — but, on reflection, incomparable — vicissitudes of States and governments from the viewpoint of international law (not to mention international persons "other than States") remain, whatever their juridical regime from the viewpoint of national legal systems, factual, not juridical, events.

law being the attribution of personality, namely, international rights and obligations, or the capacity thereof. The only tenable analogy applicable to the establishment of a State from the viewpoint of international law is thus — *mutatis*, of course, most fundamental *mutandis* — the biological coming into existence of a human being as a juridically relevant fact (*fatto giuridico*, *fait juridique*) to which (national) law attaches the legal event or effect consisting in the acquisition by the individual of a legal personality (18).

Contrary to the position taken by the ILC, first under Roberto Ago's and then under James Crawford's guidance, the States' international persons are not to be treated, for any international legal purposes (including for attribution), as *personnes morales*. They are, together with their legal systems, factual entities from the standpoint of international law.

Assuming, though, that it could be argued that the States' international persons cannot be anything but juristic entities, such quality being a *sine qua non* condition of their international legal personality and of the very existence of international law itself (any legal rules vesting them with rights and obligations), assuming that, in other words, the quality of juristic persons would be inescapably attributed to States' international persons together with personality, assuming, in sum, that such a rather imaginative proposition were acceptable, there would still remain, for the adherents to the undemonstrated normative

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(18) It is in that sense that I maintain that the setting up of States and governments is, from the standpoint of international law, a factual, not a legal event. The comparison of my position with that taken by Marek in 1968 and by Crawford in 1975 and 1979, can be read in *Dualism Revisited*, cit., at pp. 954-956, footnote 73. The same critique extends to Crawford's *The Creation of States*, cit., 2nd ed. of 2006. As well as many international legal scholars, James Crawford was presumably influenced, in choosing the title and object of his valuable, richly documented, book, by Kelsen's or otherwise kelsenian views about the nature of the relationship of municipal law to international law, in the sense that a State's legal system is somehow "derived" or legitimised by international law. This view, proved to be incorrect by Triepel and Anzilotti long ago, is nowadays surviving only due to questionable deductions from the development of international organisations and the law of human rights and human criminal accountability — not to mention other areas of the so-called humanisation and universalization of international law: developments having no direct juridical impact on the status of national law from the viewpoint of international law.

The perception of the "originary", directly independent nature of municipal law *vis-à-vis* international law and the factual nature of States (and other collective entities composing the constituency of international law) has not altered as an effect of the above-mentioned developments. National law — and this is decisive for the purposes of the very concept of attribution — is not law but merely fact from the standpoint of international law. This is true today as it was true when this obvious, simple state of affairs was recognized by the Permanent Court of International Justice as well as by the present ICJ.

theory of attribution, to prove that the attribution of individuals' or groups' conduct is an operation covered by legal rules (international law) rather than a merely logical operation carried out, on factual and logical grounds, by the judge or the observer.

Despite the authority of Erasmus Darwin, I am unable to go so far as to prefer the *a priori* reasoning. I refrain, therefore, from relying *in toto* — in order to sustain the factual concept of attribution — upon the mere theorem that the States' international persons are neither juristic persons in a non-strict sense, as conceded after all by Roberto Ago, nor juristic persons *strictissimo sensu* as maintained by us on the wake of Chief Justice Marshall *dictum*. Even refraining that much from any *a priori* argument — although the whole normative theory is nothing but an Ago's, Crawford's and the entire ILC's *a priori* assertion — and conceding, for the sake of argument, that to an extent to be ascertained the States' international persons are endowed with some of the features of juristic persons (*personnes morales*) in a sense comparable, to that extent, to the features of juristic persons under municipal law and particularly to the State's *personne morale* of national law, even then it would be hard indeed, maybe impossible, not to admit that the degree of juridicity of the States' international persons from the standpoint of international law is directly proportional to the degree of juridicity which is typical — according to Hart, for instance — of the whole of international law.

Another way to put this is: much as the aforementioned argument may effectively contradict the position taken based on a comparison of the States' international persons with juristic persons *stricto sensu* — and in contrast with Ago's, Crawford's and the ILC's purely deductive reasoning — there would still remain for the normativists to demonstrate whether attribution to the States' international persons is put into effect by international rules in the same manner — notably, with the same degree of normative intensity — characterizing attribution to national juristic persons, or whether any significant differences exist, to be reckoned in the practice and theory of attribution, between attribution to juristic persons, on the one hand, and attribution to the States' international persons, on the other hand. In other words, even if the States' international persons were really juristic persons, they are not juristic enough (so pervasively penetrated or structurally conditioned, if at all, by international law) for the attribution to them of objectionable officials' conduct for international legal purposes to be fully, and thoroughly conditioned by international legal norms. Given an "X" degree of factuality of any or most rules of international law or of any or most legal situations pertaining to the area of State respon-

sibility, it is hardly credible that the attribution process for the purposes of State responsibility is not affected by factuality to some degree.

Be that degree as it may, the specific *datum* to be stressed for attribution purposes, directly relevant for the issue of the process' nature, is that, unlike juristic persons and subdivisions under national law, pervasively organized and penetrated by municipal law and able to act within that law exclusively through their lawful agents (any such agents validly operating exclusively within the sphere of their respective competence) — any factually intervening agent being only conceivable as factually related (as a *nuncius*) to one of the legally entitled agents — the States' international persons are not, even assuming them as juristic persons in a broad or not strict sense, so organized or pervaded by international law (or by a municipal law genuinely recognizable as a partial or dependent legal system thereof), as to be unfailingly subject to normative attribution rules as perfect as those operating for juristic persons under municipal law. A wide margin remains for the factual circumstances of each case to play a decisive role for the purposes of international responsibility. The high degree of factuality observed in the review of recent and old international arbitral and judicial decisions, and the high frequency registered of discordance between the judicial tests from those allegedly "codified" by the ILC, prove that that margin is large enough to justify the rejection of the undemonstrated normative theory of attribution.

From the viewpoint of international law, the municipal law of any State is just the most visible, formal portion of the historic-sociological factors that constitute and cement the nation's body-politic. Not even international rules (conventional or customary) imposing upon a State obligations affecting its structure — such as the obligation to maintain a given constitutional regime or to create given administrative or judicial bodies for the protection of human rights, or simply to possess a jurisdictional system — would directly affect such a state of affairs. Any structural modification brought about within that State's national law as a result of the State's compliance with any such obligations will remain, from the standpoint of international law, as factual as that same State's pre-existing structures and any future modification thereof. Notwithstanding the presence of any such obligations, the State's organization remains within the realm of domestic jurisdiction properly understood (19). Indeed, no one but the State itself could possibly alter the State's organic structure (20).

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(19) *Le domaine réservé*, cit., and *The Plea of Domestic Jurisidiction Before the International Court of Justice: Substance or Procedure?*, in *Fifty Years of the Interna-*

The relationship of the theory of attribution with the concept of the State's international person is rarely fully perceived. Ian Brownlie, for example, is known for having criticized, at one time, the very notion of attribution as a process covered by secondary rules other than the rules attributive of responsibility. He did not pursue the matter, though, in more recent writings or in his pleadings before the ICJ in the *Genocide* case. Considering the connection of the normative concept of attribution with the concept of the State's international person as a corporation, I have the impression that his original criticism of attribution as the object of a rule distinct from the rule attributing responsibility seemed consistent with his view that there is no rule of incorporation (of States) in international law (namely, that the State is a corporeal entity not a juristic person). As he put it in the 6th ed. of his *Principles of Public International Law* (Oxford, 2003, p. 67), "in view of the complex nature of international relations and the absence of a *centralized law of corporations*, it would be strange if the legal situation had an extreme simplicity" (emphasis added). Of course, one cannot but agree that the legal situation (namely, the State of international law) is not a simple one. As I see it, though, an "international law of corporations" is absent, at least for the States' international persons, not only in general international law (supposedly "centralized") but in the (supposedly "decentralized") law of treaties as well.

25. An important practical correction of the normative theory of attribution comes from Perassi's and Morelli's works, notwithstanding that both authors start, as well as Ago, from Anzilotti's theory of the State's [international person's] juristic nature. For the sake of brevity I focus on Morelli's construction, which is less dated than Perassi's, and whose *prima facie* complexity is fully compensated by the ultimate result (21). Moving from the notion of the State as an "abstract" (although internationally factual) entity, Morelli shares the general view that the attribution of conduct to the State ('s international person) is

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tional Court of Justice, Essays in Honour of Sir Robert Jennings (Lowe and Fitzmaurice eds.), Cambridge, 1996, pp. 440-464.

(20) The situation is similar to the case of international rules setting forth positive or negative obligations relating to the *octroi* or withdrawal of the nationality of a State. As it is obvious — and as explained in *Domaine réservé* — the *octroi* or withdrawal of a State's nationality *remains* a matter of domestic jurisdiction simply because no other State and no international organ could substitute itself to the State in question in complying or not complying with the relevant obligation by the actual *octroi* or withdrawal of nationality.

(21) MORELLI, *Nozioni*, cit., p. 183 ff.

a juridical imputation process governed by international law: a view inherited from Anzilotti and so far coinciding with Ago's above-considered assumption (22). According to Morelli, imputation is based upon two conditions consisting in the quality of a [State] organ and the organ's competence, both pertaining to the State['s international person]'s organization, the latter seen by the author as a task of international law. So far, it would seem that Morelli's construction has no basic differences from Ago's: attribution would be a juridical operation carried out by international law. It would even seem, so far, that Morelli would go a bit further than Ago in the juridicization of the attribution process, as Ago did not contemplate a State-organizing role for international law. However, from this point onwards Morelli takes a bluntly realistic step: the "determination" of the attribution conditions (namely the quality of organ and its competence) is achieved [by international law] not directly, as one might expect, but by a *renvoi* ("riferimento") to the State's "organizzazione effettiva", viz. the actual State organization. After starting, like Ago, from a juridical construction of the State's international person, Morelli (as well as Perassi and Anzilotti before him) ends up with a quite realistic "organizzazione effettiva" severely rejected by Ago as groundless and impracticable. The apparent inconsistency perhaps explains why even commentators who should be aware of Morelli's writing's accuracy stop halfway in their analysis and place Morelli, together with Perassi, among "gli autori che si ispirano alla concezione secondo cui il diritto internazionale provvede ad organizzare lo Stato attraverso proprie norme" (23). We deem consequently inappropriate (although it may be justified at first sight) to include Morelli among the writers who adhere to the theory that international law provides "by its rules" to the State's organization. The truth is that Morelli's passages clearly indicate that he considered States as factual, socio-political entities. The noted inappropriate understanding of Morelli's position is *prima facie* justified by Morelli's rather elaborate reasoning (24), that leads, though, to

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(22) Morelli's reasoning is expressly related to the consideration that the attribution of conduct to an abstract entity (such as any collective body) is the task of the legal system within and by which the given entity is vested with personality.

(23) PALCHETTI, *L'organo di fatto*, cit., p. 26, note 44. In the next note 45 (pp. 26-27) the same author recalls Ago's view as based instead on a primacy of national law while Ago seems to adhere to the effective organization doctrine ("l'ensemble des structures concrètes par lesquelles [l'Etat] manifeste son existence et exerce son action", *Troisième Rapport*, cit., p. 249) paying attention to municipal law only as a fact or as a *prima facie* evidence.

(24) MORELLI, *Nozioni*, cit., p. 185 f., para. 111.

the identification of "organizzazione di fatto" or "organizzazione effettiva" as the decisive factor of attribution (25): a reasoning that the present writer finds perfectly convincing albeit somehow obscured by the juridical concept of imputation (26). Were it not for their formal adherence to a concept that Anzilotti himself professed only in the abstract, Perassi's and Morelli's position signals a decisive support for the factual concept of the process.

26. The fundamental cause of the confusion in the practice and the literature on attribution, and first of all in the work of the ILC on the topic, is precisely the normative theory. It is indeed the juridical concept of attribution that obscures the otherwise clear perception that from immemorial time, up to the time when the ILC started theorizing under Ago's guidance — allegedly on the strength of an inductive method — about a legal process of attribution governed by attributive "norms", attribution had always been predicated in each case by the judge or arbitrator on the actual strength of the factual features of the relationship between the acting person or persons and the State involved, the only role of international law being that played by the primary rule or rules attributing responsibility.

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(25) *Ibid.*, pp. 187-188, para. 112.

(26) In specifying Morelli's position in the above sense, I find authoritative comfort in Spinedi's writings, including esp. *Responsabilità internazionale*, in *Enciclopedia giuridica*, vol. XXVII, 1985, p. 5, para. 2.1.1, of offprint; and *L'attribuzione allo Stato*, cit., pp. 424-425. Equally misunderstood seems to me to be Perassi's position. In addition to sharing, as well as Morelli, the juridical concept of imputation, that author also proceeds to a circular reasoning which, starting with a merely theoretical assumption that it would be for international law to proceed to imputation of human conduct to the State's international person, ends up with the conclusion that international law, far from setting directly the conditions for imputation, proceeds instead, for their determination, to a mere *renvoi* to the State's municipal law: a position that only *primissima facie* could be understood as purporting the theory that attribution is effected by international legal rules. In Perassi's as well as in Morelli's construction international law acts, so to speak, just as an in-between, respectively, to effective organization (in Morelli's case) or municipal law (according to Perassi).

Ian Brownlie rightly states that "imputability" would seem to be a superfluous notion, since the major issue in a given situation is whether there has been a breach of duty: the content of "imputability" will vary according to the particular duty, the nature of the breach, and so on (BROWNLIE, *System of the Law of Nations,* cit., p. 36). The author cites QUADRI, *Droit international cosmique*, *Recueil des cours*, vol. 113, 1964-III, pp. 457-459. Felicitously inspired by the empirical methodology which is typical of English lawyers, Ian Brownlie seems though not to care, due to the very virtue of his empirism, about the (erroneous) logical premises of the theory of attribution discussed in the text.

Primary rules (and not "secondary" attribution rules) are obviously, for example, the rules (evoked by Reuter and Ago) (27) relating to the responsibility of States for any actions by members of their armed forces. Primary rules are also those applied by the European Human Rights Court's decisions evoked by Dipla in her book on the attribution of responsibility for human rights violations, as well as most, if not all, of the rules of alleged attribution evoked in Condorelli's work on *L'imputation* (28).

27. The analysis of the numerous, extremely various elements that concur in making up an unlawful State behaviour — and whose absence exclude the presence of such an unlawful behaviour — would fill volumes (29). Despite the richness and variety of the cases, it seems hardly possible to find any instances contradicting the internationally factual nature of the process so far described.

In most cases — if not all — the State's action or omission consists of a multiplicity and variety of acts or omissions of individuals or groups — a single individual's action or omission being hardly sufficient (30)— concurring to the "making-up" of the State's conduct, a bit like stone or glass squares composing a mosaic (*tesserae*) or, perhaps more appropriately, like the interlocking pieces of a jigsaw puzzle. It is difficult, though — at least for the present writer — to describe the phenomenon in rigorous and intelligible general terms. Reverting again to admittedly questionable *rapprochements*, a similarity could be found either in the combinations of behaviours and attitudes favouring or thwarting the formation of a customary rule, or — at municipal law level — in the concurrence of the facts of *servus*, animals or inanimate objects, together with the principal's behaviour, in the making-up of a tort. A more daring simile could be the concurrence of the physical and physio-psychic organs of a natural person in determining an unlawful act or omission of that person (31).

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(27) *Yearbook of the Int. Law Commission*, 1975, vol. I, p. 7, para. 5, and p. 16, para. 4, as cited in the ICTY *Tadić* Appeals Chamber judgment, cit., p. 39, para. 98, note 117.

(28) CONDORELLI, *L'imputation*, cit., p. 9 ff.

(29) A particularly rich description is in HYDE, *International Law Chiefly as Interpreted and Applied by the United States*, vol. II, Boston, 1922, p. 1387 ff.

(30) Cfr. ours *Gli enti soggetti*, cit., and *La persona internazionale dello Stato*, in *Digesto delle discipline pubblicistiche*, Torino, 2008, vol. III Aggiornamento.

(31) It will be noted, however, that the determination and proof of the appurtenance of an act to a State, for the purposes of liability, is by far harder than the determination of the conduct held by a natural person singly or in concurrence with the behaviour of other persons or with the facts of animals or inanimate objects.

The complexity of the factual relationships among individuals or groups "making up", so to speak, a State's action or omission, is further enhanced, not without important consequences (in international law), by the fact that single individual or collective acts concurring in making-up a State's action or omission may well acquire — as they frequently do — a juridical relevance of their own under the given State's municipal law. They may well coincide, at times, with the municipal law's *Tatbestande* of the given State's national law juristic person. This may possibly be a source of some confusion for the judge or arbitrator engaged in the determination of the presence or lack of a "parallel" conduct of the given State's international person, unless he is well aware of the distinction of a State's (factual) international person with that same State's (juristic) national person.

An important consequence of the feature of a State's internationally relevant conduct presently under scrutiny is that the series of *tesserae* (positive and/or negative) making up, or possibly unmaking — so to speak — a State's unlawful act or omission may prove to be discontinuous, at a stage preceding completion, or what could possibly mark the completion of the State's unlawful action or omission. The adequate perception of the complexity — and the not necessary consistency — of the various *tesserae* of the mosaic composing a State's (wrongful) conduct is also essential to distinguish the various concurring *tesserae* — including the qualitatively or quantitatively most important ones, none of which nor their ensemble constituting the State's wrongful act. An egregious example is the familiar hypothesis covered by the exhaustion of local remedies "rule". Wrongly misrepresented as an exclusively or mostly procedural rule barring the presentation of a claim to an international tribunal (and thus the tribunal's jurisdiction), that "rule" — whose procedural nature must of course be recognised whenever it is required as a condition of the setting up or of the competence of an arbitral or judicial body — is simply a factual, logical reflection of the fact that a State's unlawful act that could possibly have materialized, has not, in fact, materialized due to the absence of the *tesserae* that would perfect, so to speak, the "picture" of the State's unlawful conduct. The most typical case is that of a *déni de justice* by a low-ranking judge, that was remedied by a superior court (32).

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(32) AGO, *La regola del previo esaurimento dei ricorsi interni*, *Archivio di diritto pubblico*, vol. III, 1938, p. 5 ss. of the offprint and *passim*; ID., *Le délit*, cit., p. 512 ff.; BISCOTTINI, *Volontà ed attività dello Stato nell'ordinamento internazionale*, *Rivista di*

Some attention is called for about the attribution of an unlawful act to a State in the cases of injurious acts of subordinate officials and injurious acts of private parties. In both instances the factual nature of the operation seems to be not only confirmed, but particularly clear; and the two instances are characterized by a high degree of similarity (33).

Neither the *déni de justice* to a national of State B on the part of a low-ranking court of State A nor the injurious act to State B by a national or resident of State A materializes *per se* an unlawful act of State A. The court's judgement and the private party's action may well possess a relevance of its own within State A's law and trigger judicial or administrative consequences under that law, such as, for example, successful or unsuccessful resort to administrative or judicial remedies on the part of the injured foreign national or the injured foreign State. However, an internationally unlawful act of State A and the consequent international liability of that State will occur only if the low court's internationally injurious judgement is not corrected by a higher court or if the private party's injurious conduct does not meet adequate reaction and remedy on the part of State A's administrative or judicial authorities.

The fact that the injurious act consists in a more or less substantial part in the lower court's or the private party's conduct — coupled with the fact that that act may have a juridical individuality of its own as a relevant legal fact within State A's law — may easily generate the idea that that act integrates by itself State A's international delict: a solution rightly excluded by Roberto Ago's authoritative scholarship (34). It is probably the same circumstance that generates — in the two hypotheses in discourse — both the idea that the actions or omissions of State

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diritto int., 1942, p. 32 s.; MONACO, *La responsabilità internazionale dello Stato per fatti di individui*, *Rivista di diritto int.*, 1939, p. 3 ff., p. 193 ff.

(33) The similarity of these two hypotheses is increased by the fact that the private individual, while obviously endowed with personality in national law is not — or not as surely and regularly — endowed with personality under international law. That shows, in my opinion, that the act of the individual which is injurious to a foreign State (under the condition that it is accompanied by an act or omission of some State organ) may well appear and possibly be recognized, in given circumstances, as a component of the State's unlawful act. I venture to think that the reason why most contemporary writers — and Ago among them — are inclined not to recognize the private individual's conduct as an integral part of the State's unlawful act is that they hesitate to assume the individual for what the natural human person is from the standpoint of international law, namely an object rather than a subject of law. Hence the idea that the private individual action or omission is envisaged as the conduct of a subject rather than an object of international law.

(34) AGO, *Le délit*, cit., p. 512 ff.; MONACO, *La responsabilità*, cit., pp. 194, 196.

A's organs in connection with the private party's act or the higher courts' behaviour (in the *déni de justice* case) are the condition of the "imputation" to State A of the private party's or lower court's act, and the idea that the lower court's or the private party's act materializes State A's "indirect" liability for the lower court's or the private party's act or omission, or even the theory that the lower court's or private party's act or omission is the "occasion" of State A's liability.

A further step must be taken, in my opinion, not only by rejecting the theory of indirect liability, but also by recognising that the liability for a private party's action is really very close in its structure — namely from the viewpoint of the relationship of the agent's injurious action or omission to the State's fabric — to the liability for injurious acts of subordinate organs. The analogy should imply not just that in the private party's case the State's liability is predicated in the presence of action or omission by State organs as well as in the case of a subordinate organ. It implies furthermore — and more importantly — that the private party's injurious conduct becomes, through the involvement of the State organs' action or omission, and despite the private party's relatively less intense connection with the State (than that of an organ), a material component of the State's delict. I submit, therefore, that a realistic construction of the phenomena in discourse must move back, so to speak, contrary to the trend rightly prevailing in the area of the liability of juristic persons and of the State's person in national law, to the organic concept of the State and particularly to the barbaric concept of "group solidarity" in the germanic sense (if not of "collective responsibility"); and one must do so not just for the case of the subordinate organ's but also for the case of the private party's injurious act.

Much as it may sound rough, such a step — in a decidedly "organicistic" direction — could facilitate the construction of a number of instances involving the objective as well as the subjective element of an international delict: a direction that might conform to Roberto Ago's indicated views more than it may appear at first sight. Albeit protected in his or her individuality by the so-called transnational law of human rights and subjected (unless protected by the immunity ensured by retrograde practices to the nationals of given States) to the so-called transnational criminal law, the individual citizen or resident is, within the State, only a *tessera* of the State's fabric. Any internationally relevant injurious act that he/she may commit as a formally or informally appointed organ under the State's law, or "practice", or just as a private party is, actually or (in given circumstances) virtually, a

tessera of the given State's fabric and of that State's internationally unlawful actions or omissions. Where the State's organs' concurring action or omission adds the indispensable complement to the private party's internationally injurious conduct, the latter conduct plays exactly, in the building or making-up of the State's delict, the same role which in the civil law of tort is played by the *servus*'s injurious conduct, I daresay even the same role of the animal.

Regarding the acts of private parties, one of the points to be clarified is the exact technical meaning of "catalyze" and "catalyser". In cases such as *Hostages*, *Nicaragua*, *Tadić*, the private party's or parties' act(s) would remain, according to a doctrine generally ascribed to Ago, well outside the "act of the State". I am inclined to continue to believe, however, just as I did in 1951 (*Gli enti soggetti*, cit.) — and the three cited cases may well prove my point — that, once the State organs' behaviour is not adequate to remove the *vulnus* created by private parties, or once the State "appropriates itself" of the private party's or parties' injurious conduct (as in the *Hostages* case), the private party's or parties' conduct becomes an integral part of the State's unlawful conduct as the triggering event of the State's responsibility. In other words, the private individual(s)' conduct is a complement of the State's wrongful act (once the above-mentioned conditions are met) in the same way as the subordinate organ's injurious conduct becomes a State's wrongful act's integral part once the relevant superior organs' conduct meets the requirement necessary for triggering the State's responsibility. Much as he or she may be protected (though not everywhere) as a natural person under the law of human rights — and assumed (though not everywhere) as a subject of criminal law before international criminal tribunals — the private individual remains, from the standpoint of international law, within the fabric of his State of nationality or residence but one of the innumerable *tesserae* whose action or omission may become an element of that State's actions or omissions. From the viewpoint of international law, the private man or woman does not essentially differ from the innumerable *tesserae* — represented by the men and women who compose the various echelons — and especially the lowest echelons — of the State's organisation (35).

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(35) The present writer's position relating to attribution is adhered to, together with the factual concept of the State's international person, by Giuseppe Palmisano in a number of important contributions, the first and main of which is *Colpa dell'organo*, cit., p. 625 ff. Another contribution by the same author is *Les causes d'aggravation de la responsabilité des Etats et la distinction entre "crimes" et "délits" internationaux*, *Revue générale de droit int. public*, 1994, pp. 629-673. This scholar's writings contain

I am reluctant to share, therefore, Roberto Ago's and other scholars' view that in the private party's injurious act hypothesis, the private party's conduct would only operate as a catalyst of the State's delict, as such remaining outside the *Tatbestand* of the international delict. Ignorant as I am of the sciences involved, I refrain from arguing the finesses of the concept of catalysis, apparently espoused in the International Law Commission's 2001 Articles (36). I wonder, though, whether the catalyst's extraneity to the reaction is as total as the supporters of the view in question seem to believe. Isn't it possible that while not chemically involved the catalyst is otherwise involved?

28. The practical conclusion to be drawn from the factual nature of attribution is that the rules covering that topic at the outset of the ILC Articles on State Responsibility (those adopted on first reading in 1996 and those finalized in 2001) are not, in a proper sense, legal norms — much less the governing customary rules on attribution that the ICJ seems to believe them to be.

They are simple statements or *constats* of *id quod plerumque de facto accidit* — or of *id quod*, more or less frequently, *accidebat*, up to the year 1975, 1996 or, for that matter, 2001. In other words, they are criteria followed that far by observers (commentators, foreign office legal advisers, judges, arbitrators or commissioners) in attributing real or alleged unlawful actions or omissions to a State's international person.

Despite their presence in the opening part of the series of Articles purportedly codifying the general (secondary) norms of international law on State responsibility, those Articles remain merely factual statements or *constats* (37). Manifest evidence of this are both: (*a*) the very context of the ILC's attribution Articles; and (*b*) the practice of international adjudication subsequent to those Articles' provisional, first reading or even final adoption. Both points call for further stressing in discussing the merits of the ILC's choices since 1971.

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remarkable developments with regard to both the nature of the State's international person and with regard to fault in general and wilful intent (*dolus*) in particular. His writings also contain very useful references not only to the work of the ILC on State responsibility but also to the present writer's Reports to the ILC.

(36) See the commentary to the Articles' Chapter II, in *Yearbook of the Int. Law Commission,* 2001, vol. II, Part Two, p. 38 ff.

(37) This is without prejudice, of course, to the binding force of any relevant rules of international substantive or procedural law relating to evidence and the burden of proof.

The factuality of the provisions of the Articles is attested, first of all by the contents of the attribution Articles themselves. Those of 2001 as well as those of 1996 do indicate indeed, in principle, as a criterion for attribution, the relevant State's municipal law. However, that law, surely not a part of international law (not in the sense, at least, in which the by-laws of a private or public corporation are part of national law), is *per se* a merely factual element to be considered from the viewpoint of international law. Moreover — and possibly even more decisively — the attribution Articles themselves contain provisions unambiguously referring to elements unquestionably void of any normative content under national as well as under international law.

Purely factual criteria are referred to, for example, in draft Article 8 as adopted on first reading (1996), according to which an act that would not be attributable to a State under its internal law may be attributable to it if it was committed by persons factually acting on the State's behalf ([38]). Another example is draft Article 10 (also as adopted on first reading in 1996), providing that an act equally non-attributable under the internal law of a State can be internationally attributed to it if it was committed by organs factually acting in the exercise of governmental authority but outside their competence under national law or in contravention of their instructions. Not less significant are Articles 8 and 9 adopted on final reading in 2001, the first attributing to a State the conduct of a person or group of persons factually acting, in carrying out the relevant conduct, on the instructions of, or under the direction or control of, the State, and the second attributing to the State the conduct of a person or group of persons factually exercising

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([38]) It is a paradox that the very Roberto Ago, who had invented in 1939, and later confirmed in 1971, by way of deduction, the false normative theory of attribution, adopted by the ILC as a whole without any check, is the same Roberto Ago who presented to the ILC the best criterion of attribution to the State of conducts carried out by entities or persons not belonging to the State's organization. I am referring to the "on behalf" (or "pour le compte") criterion, put forward in his Third Report (1971) and provisionally adopted by the ILC in 1980. The criterion I refer to is not, however — contrary to what was maintained by Ago — a criterion singled out, by way of deduction from the arbitral and judicial practice which preceded 1971, as a legal condition for attribution of a conduct to the State on the basis of a supposed customary rule. It is a factual link between a human conduct and the State. A factual link that was clearly dominant in the practice which precedes 1971. It is on this factual link that the ICJ should have proceeded to attribute: *a)* to Iran, the conduct of students and other activists concerning the occupation of the US Embassy and the taking as hostages of the US personnel, already in the first stage of the *Hostages* dispute; *b)* to the United States, the conduct of the so-called contras in the *Nicaragua* case; *c)* to the Federal Republic of Serbia and Montenegro, the genocidal acts carried out in Bosnia in the *Genocide* case (2007).

elements of the governmental authority in the absence or default of the official authorities and in circumstances that call for the exercise of those elements of authority. In none of such cases, surely, there is any requirement of a national law attribution even where a national attribution were available.

The only "operation" international law really carries out with regard to the individual acts in question is the imputation, attribution or attachment to the State of the legal consequences of the resulting international person's conduct. International law, in other words, has only to decide whether the act is of legal relevance, for whom and with what consequences. The only imputation under international law thus is what Kelsen calls *periphere Zurechnung*.

It is thus the "observer", the commentator and the judge, if any, who performs the factual (although, hopefully, logical) operation necessary to "compose", so to speak, the various (always multiple) individual actions or omissions that concur in materializing the *Tatbestand* or *fattispecie* of a commissive or omissive unlawful act of a State's international person.

The fact that the rules in question are just guiding principles deprived of binding force means that there well may be situations and circumstances where the judge (if any) or any other operator would find no legal obstacle in departing more or less materially from the rules in question, in affirming or denying attribution of given allegedly unlawful actions or omissions, to a State's international person.

Had the ILC refrained from the uncalled for haste with which it concluded an almost half-century work on State responsibility that could have lasted another quinquennium without harm, it might have been able to reckon with the practice following *Nicaragua*, *Tadić* and, mainly, *Tadić*'s aftermath. Had a few more years been devoted to the draft, the alleged rules of "customary law" on attribution — pace the ICJ — would surely look, assuming that they would have been preserved at all in the draft, very different, or at least more convincing, than those adopted in 2001.

The above conclusions imply that there is no such thing as a law of attribution of conduct to the States for the purposes of international responsibility. That there is no general conventional law is, of course, a consequence of the fact that the ILC Articles are only the product of the Commission's recommendation and of the UN General Assembly' recommendation. Contrary to the view of the International Court of Justice, neither is there a customary law of attribution, because our rejection of the normative theory of the ILC shows that, although

empowered to codify, the ILC has actually not done so, as it wrongly assumed that a law of attribution was proved to exist by the pre-1971 arbitral and judicial decisions and was not able to prove that any such customary law had come into being thereafter. The repeated assertion by the ICJ of the existence of a customary law of attribution, particularly but not exclusively in the *Nicaragua* and *Genocide* cases, was founded on the wrong assumptions that the ILC had really codified the relevant rules. In no case has the Court shown the existence of the customary law in question through a search of its own about the presence of the elements of any customary rules of such kind. The decisions of arbitrators and international tribunals, or of the ICJ itself, are not conditioned by the alleged customary or other attribution rules any more than the decisions on attribution preceding the formulation of Articles on the matter by the ILC between 1971 and 2001.

Considering that attribution is essentially a *quaestio facti*, it is not very likely that rules of customary law come about except with regard to attribution in special circumstances. It is to be hoped, however, if any customary attribution rule came about covering the hypotheses contemplated in Article 8 of the ILC's 2001 Articles, that the rule draws inspiration from Roberto Ago's "on behalf [pour le compte]" test. It should not adopt the test "on the instructions of, or under the direction or control of" — as illustrated by Ago in his separate opinion in *Nicaragua* — that allowed US to escape liability for the *contras'* misdeeds. Such a strict test, successfully proposed *tel quel* by Special Rapporteur James Crawford, would too easily encourage the use by States of questionable practices, such as that of private contractors.

POST SCRIPTUM

Except for one occasion, the present writer had not much to do formally, with attribution. When he was elected to the Commission (1986), Roberto Ago's articles on attribution had already been provisionally adopted by the ILC, those articles being at that moment set aside, to be taken up in 1996 in view of the adoption at first reading of the whole set. The occasion for me to deal with attribution was when, in my second report, I took up the matter of fault and was unable to share Kelsen's and Anzilotti's opinion (shared by Ago and the Commission) that fault was not an element for State responsibility: a view connected with both Masters' concept of the States' international persons as juristic persons (*personnes morales*) (1). Believing that such was not the case, namely that the States' international persons were merely factual collective entities, I wrote, in the report, that attribution of fault was, as well as the attribution of any human behavior, a matter of fact (2). This was a clear rejection of the normative theory shared by Roberto Ago and the whole ILC memberships.

I do not remember that anyone in that year's session took issue with my pronouncement. It was likely that no one bothered, and I do not recollect any discussion on this subject. The issue would come about, I thought, in 1996, in view of the adoption of the Articles at first reading. And I planned to start work, in the Spring of 1996, precisely on the first part of the draft that contained the attribution articles as a work that would be essentially a rebuttal of the normative theory and Roberto Ago's provisionally adopted articles on attribution.

It so happened, though, that in mid-1996 I was informed that the obviously unconcerned Italian Minister of Foreign Affairs at the time and her advisers were planning not to make me a candidate for re-election for the ILC's following quinquennium. Consequently, after trying in vain to convince the Minister that Italy would miss the important chance of seeing the name of a scholar from the Italian

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(1) ARANGIO-RUIZ, *Second Report on State Responsibility*, in *Yearbook of the Int. Law Commission*, 1989, vol. II, Part One, p. 50, para. 170.

(2) *Ibid.*, paras. 170-171.

school of international law linked to the final text of the State responsibility draft, I decided to participate as little as possible in the further elaboration of the (in my view erroneous) attribution articles. In the last weeks of the 1996 ILC session, I resigned from rapporteurship and refused to participate in the work of the Drafting Committee on the first reading of the project. Sure as I was that I would not be able to make any change in Ago's provisionally adopted attribution articles — and considering that in the absence of records in the Drafting Committee it would have been impossible for me to register my opposition to the normative theory and the relevant attribution articles — I could only give up any idea of making my views taken into adequate account in the first reading version of the articles of attribution.

As I remember it, I voted against the adoption of the first reading text of the draft.

To conclude the story, my ministerial exclusion from the 1996 election to the Commission — an event that I had done my best to avoid and that gave me much grief — proved to be a blessing. Had I remained in the Commission, I would have spent the best part of those following five years in a struggle with the majority (if not unanimity) of the Commisssion which would have remained steadfast as one man to maintain its adherence to the normative theory and Ago's relevant articles on attribution. I can see clearly, now, that I must be grateful to the unconcerned Minister of Foreign Affairs.

APPENDIX

A. Draft Articles on attribution of conduct to a State submitted by Special Rapporteur Ago in 1971 and 1972

Chapter I
GENERAL PRINCIPLES

Article 2
Conditions for the existence of an internationally wrongful act

An internationally wrongful act exists when:

(*a*) conduct consisting of an action or omission is attributed to the State in virtue of international law; and

(*b*) That conduct constitutes a failure to comply with an international obligation of the State.

Chapter II
THE "ACT OF THE STATE" ACCORDING TO INTERNATIONAL LAW

Article 5
Attribution to the State, subject of international law, of the acts of its organs

For the purposes of these articles, the conduct of a person or group of persons who, according to the internal legal order of a State possess the status of organs of that State and are acting in that capacity in the case in question, is considered as an act of the State from the standpoint of international law.

Article 6
Irrelevance of the position of an organ of the State in the distribution of powers and in the internal hierarchy

For the purposes of determining whether the conduct of an organ of the State is an act of the State under international law, the questions whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or subordinate position in the hierarchy of the State, are irrelevant.

Article 7
Attribution to the State, as a subject of international law, of the acts of organs of public institutions separate from the State

The conduct of a person or group of persons having, under the internal legal order of a State, the status of an organ of a public corporation or other autonomous public institution or of a territorial public entity (municipality, province, region, canton, member state of a federal State, autonomous administration of a dependent territory, etc.), and acting in that capacity in the case in question, is also considered to be an act of the State in international law.

Article 8
Attribution to the State, as a subject of international law, of acts of private persons in fact performing public functions or in fact acting on behalf of the State

The conduct of a person or group of persons who, under the internal legal order of a State, do not formally possess the status of organs of that State or of a public institution separate from the State, but in fact perform public functions or in fact act on behalf of the State, is also considered to be an act of the State in international law.

Article 9
Attribution to the State, as a subject of international law, of the acts of organs placed at its disposal by another State or by an international organization

The conduct of a person or group of persons who, according to the legal order of a State or of an international organization, possess the status of organs and who have been placed at the disposal of another State, is considered to be an act of that State in international law, provided that those organs are actually under the authority of the State at whose disposal they have been placed and act in accordance with its instructions.

Article 10
Conduct of organs acting outside their competence or contrary to the provisions concerning their activity

1. The conduct of an organ of the State or of a public institution separate from the State which, while acting in its official capacity, exceeds its competence according to municipal law or contravenes the provisions of that law concerning its activity is nevertheless considered to be an act of the State in international law.

2. However, such conduct is not considered to be an act of the State if, by its very nature, it was wholly foreign to the specific functions of the organ or if, even from other aspects, the organ's lack of competence was manifest.

Article 11
Conduct of private individuals

1. The conduct of a private individual or group of individuals, acting in that capacity, is not considered to be an act of the State in international law.

2. However, the rule enunciated in the preceding paragraph is without prejudice to the attribution to the State of any omission on the part of its organs, where the latter ought to have acted to prevent or punish the conduct of the individual or group of individuals and failed to do so.

Article 12
Conduct of other subjects of international law.

1. The conduct of a person or group of persons acting in the territory of a State as organs of another State or of an international organization is not considered to be an act of the first-mentioned State in international law.

2. Similarly, the conduct of a person or group of persons acting in the territory of a State as organs of an insurrectional movement directed against that State and possessing separate personality is not considered to be an act of that State in international law.

3. However, the rules enunciated in paragraphs 1 and 2 are without prejudice to the attribution to the State of any omission on the part of its organs, where the latter ought to have acted to prevent or punish the conduct of the person or group of persons in question and failed to do so.

4. Similarly, the rules enunciated in paragraphs 1 and 2 are without prejudice to the attribution of the conduct of the person or group of persons in question to the subject of international law of which they are the organs.

5. The rule enunciated in paragraph 2 is without prejudice to the situation which would arise if the structures of the insurrectional movement were subsequently to become, with the success of that movement, the new structures of the pre-existing State or the structures of another, newly constituted State.

Article 13
Retroactive attribution to a State of the acts of organs of a successful insurrectional movement

1. The conduct of a person or group of persons who, at the time when such conduct was engaged in, were organs of an insurrectional movement whose structures have subsequently become the structures of a new State constituted in all or part of the territory formerly under the sovereignty of the preexisting State is retroactively considered to be an act of the newly constituted State.

2. The conduct of a person or group of persons, who at the time when such conduct was engaged in, were organs of an insurrectional movement whose structures have subsequently been integrated, in whole or in part, with those of the pre-existing State is retroactively considered to be an act of that State. However, such attribution does not preclude the parallel attribution to the said State of the conduct of a person or group of persons who, at the aforementioned time, were organs of the government which was at that time considered to be legitimate.

B. Draft Articles on attribution of conduct to a State adopted on first reading by the ILC in 1996

Chapter I
GENERAL PRINCIPLES

Article 3
Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when:

(*a*) conduct consisting of an action or omission is attributable to the State under international law; and

(*b*) That conduct constitutes a breach of an international obligation of the State.

Chapter II
THE "ACT OF THE STATE" UNDER INTERNATIONAL LAW

Article 5
Attribution to the State of the conduct of its organs

For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.

Article 6
Irrelevance of the position of the organ in the organization of the State

The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or subordinate position in the organization of the State.

Article 7
Attribution to the State of the conduct of other entities empowered to exercise elements of government authority

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered an act of the State under international law, provided that organ was acting in that capacity in the case in question.

Article 8

Attribution to the State of the conduct of persons acting in fact on behalf of the State

The conduct of a person or group of persons shall also be considered an act of the State under international law if:

(*a*) It is established that such person or group of persons was in fact acting on behalf of that State; or

(*b*) Such person or group or persons was in fact exercising elements of the governmental authority in the absence of the official authorities in circumstances which justified the exercise of those elements of authority.

Article 9

Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization

The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed.

Article 10

Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity

The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity.

Article 11

Conduct of persons not acting on behalf of the State

1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph and which is to be considered as an act of the State by virtue of articles 5 to 10.

Article 12

Conduct of organs of another State

1. The conduct of an organ of a State acting in that capacity which takes place in the territory of another State or on any other territory under its jurisdiction shall not be considered as an act of the latter State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that State by virtue of articles 5 to 10.

Article 13
Conduct of organs of an international organization

The conduct of an organ of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction.

Article 14
Conduct of organs of an insurrectional movement

1. The conduct of an organ of an insurrectional movement which is established in the territory of a State or in any other territory under its administration shall not be considered as an act of that State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that of the organ of the insurrectional movement and which is to be considered as an act of that State by virtue of articles 5 to 10.

3. Similarly, paragraph 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law.

Article 15
Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State

1. The act of an insurrectional movement which becomes the new government of a State shall be considered as an act of that State. However, such attribution shall be without prejudice to the attribution to that State of conduct which would have been previously considered as an act of the state by virtue of articles 5 to 10.

2. The act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered as an act of the new State.

C. Draft Articles on attribution of conduct to a State adopted by the ILC in 2001

Chapter I
GENERAL PRINCIPLES

Article 2
Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(*a*) is attributable to the State under international law; and

(*b*) constitutes a breach of an international obligation of the State.

Chapter II
ATTRIBUTION OF CONDUCT TO A STATE

Article 4
Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 5
Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 6
Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Article 7
Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Article 8
Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 9
Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements

of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 10
Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered as an act of that State by virtue of articles 4 to 9.

Article 11
Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.